Supreme Court, U.S.
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No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1997

WILLIAM M. FIORE, t/a
FIORE TRUCKING AND CONTRACTING,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Middle District, from the Order dated May 9, 1997, denying Appellant's Application for Reargument

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QUESTIONS ON REVIEW

Questions presented for review:

1. Did the Appellate Courts of Pennsylvania deny Petitioner procedural due process by permitting the Commonwealth of Pennsylvania to assert a new theory of tax liability after the Commonwealth conceded, following the completion of administrative proceedings and during statutory appeal, the validity of Petitioner's original defense to the Commonwealth's theory of tax liability.

Answered in the affirmative.

2. Did the Commonwealth Court of Pennsylvania deny Petitioner procedural due process in not affording him adequate time or opportunity to prepare his defense to the Commonwealth's new theories of tax liability at a hearing upon remand from the

Pennsylvania Supreme Court.

Answered in the affirmative.

3. Did the Commonwealth Court of Pennsylvania deny Petitioner procedural due process in failing to create a record of evidence Petitioner offered during the evidentiary hearing on remand.

Answered in the affirmative.

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CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

This appeal relates to the entry of judgment of the Pennsylvania Supreme Court, dated March 25, 1997, at Nos. 83, 84 and 85 M.P. Appeal Docket 1996, by which the Court affirmed the Order entered April 22, 1996 in the Commonwealth Court at 925 C.D. 1980, 895 C.D. 1985, and 1029 C.D. 1985.

By Order dated May 9, 1997, the Pennsylvania Supreme Court denied Appellant's Application for Reargument.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE

All issues raised in this appeal invoke the due process protections provided by the Fourteenth Amendment of the United States Constitution which reads in relevant part as follows:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

The purpose of this petition is to seek redress where state courts flaunted due process in favor of a taxing authority in the unusual situation of a citizen who continued to challenge his major assessment while incarcerated. Instead of properly situating itself between the state and the individual, the judiciary allowed the government to offer an entirely new theory of assessment after 10 1/2 years, to hinder the incarcerated individual's access to his own files prior to the hearing, and finally to offer Petitioner a hearing (where he proceeded pro se) so deficient and perfunctory as to make it impossible to discern which documentary materials were entered into evidence, received into the record, or even considered by the court.

The controversy in this case revolves around two audits conducted by the Commonwealth of Pennsylvania, Department of Tax and Revenue, for the periods from

January 1, 1975 to September 30, 1978 and October 1, 1978 to December 31, 1981. These audits resulted in Appellant Fiore being assessed in excess of One Million Dollars ($1,000,000.00) for failure to pay sales and use tax on purchases made by Appellant in his trucking business which Appellant contended was tax exempt as a common carrier.

The Petitioner filed for Petition of Reassessment with the Board of Appeals of the Department of Revenue, asserting that no tax was due because the Petitioner was entitled to an exemption as a common carrier with public utility authority. The Board of Appeals found the assessment to be valid based on the theory that the Petitioner was not entitled to a common carrier exemption because he hauled for essentially one customer, United States Steel.

The Petitioner then exhausted the Department of Revenue administrative appeals process. The Board of

Finance and Review again denied the Petitioner's exempt status solely because it found that the Petitioner did not qualify as a common carrier because he hauled for predominantly one customer.

The Petitioner then timely filed a Petition for Review with the Commonwealth Court of Pennsylvania. At an evidentiary hearing before the Commonwealth Court, in January, 1991 after approximately ten and one-half years of litigation, the Commonwealth of Pennsylvania admitted that "... nothing in the definitional section requires that a common carrier perform for any particular number of customers", thereby sustaining the Petitioner's contention that he owed no tax because he qualified for an exemption as a common carrier.

The Commonwealth Court, however, allowed the Commonwealth to change its theory of litigation, abandoning the "one customer" approach and adopting a completely new theory that the Petitioner owed tax because

he did not hold a PUC license and had poor records; the Commonwealth Court gave the Petitioner only twenty days to respond to an entirely new theory. On August 9, 1991, the Commonwealth Court affirmed the decision of the Board of Finance and Review. Fiore v. Commonwealth of Pennsylvania, 596 A.2d 1147 (Pa. Cmwlth. 1991).

The Petitioner then appealed to the Pennsylvania Supreme Court on a number of grounds, one of which was that he was denied procedural due process. The Court vacated the Commonwealth Court's decision and remanded the case for a new hearing. Fiore v. Commonwealth of Pennsylvania, 633 A.2d 1111 (Pa. 1993). The Court held that giving the Petitioner only twenty days to prepare for trial after the Commonwealth changed its position of ten and one-half years, was a violation of procedural due process and ordered a new hearing in the Commonwealth Court. However, the Supreme Court of Pennsylvania rejected the Petitioner's contention that his appeal should

be sustained and the assessments in excess of One Million Dollars should be dismissed.

On remand to the Commonwealth Court, the Court conducted an evidentiary procedure. Petitioner, by then an incarcerated person in Pennsylvania, represented himself pro se. At this hearing the Court violated Petitioner's procedural due process rights by its failure to afford Petitioner access to his files; the Court compounded its error when it failed to create a clear, complete, and permanent record of those proceedings. In particular, while Petitioner, acting pro se, presented several boxes of his business documents to be made part of the record, the Court never had those documents identified and docketed, or ruled on their admissibility. The Commonwealth Court again affirmed the decision of the Board of Finance and Review. Fiore v. Commonwealth of Pennsylvania, 668 A.2d 1210 (Pa. Cmwlth. 1995). The Petitioner filed an appeal from this decision to the Pennsylvania Supreme

Court, asserting that he had been deprived of procedural due process, and that he was blocked from presenting his case due to that court's refusal to be clear about which documents it would admit and the resultant amorphous record. Pennsylvania Supreme Court denied the appeal and affirmed the Commonwealth Court's decision on March 25, 1997. A Petition for Reargument was timely filed, but was denied on May 9, 1997. This Petition seeks review of that decision.

Petitioner raised the first issue, whether due process was violated when Respondent asserted new theories of liability, in his brief on appeal at William M. Fiore t/a Fiore Trucking and Contracting v. Com. of Pa., No. 50.51 and 52 M.D. Appeal Docket 1992, at pages 22-28 and 45-49. The Supreme Court did not directly address this claim in its Opinion (App. 73).

Petitioner raised the second and third issues, that he was denied due process in being denied adequate access to

his records prior to the remand hearing and that the Commonwealth Court denied him the opportunity to put evidence into the record, in his brief to the Pennsylvania Supreme Court in William M. Fiore t/a/ Fiore Trucking and Contracting v. Com. of Pa., Nos. 83, 84 and 85 M.D. Appeal Docket 1996. The Supreme Court of Pennsylvania affirmed the Commonwealth Court's decision without opinion. (App. at 143).

DISCUSSION

The guarantees of due process are specifically set the Fifth and Fourteenth Amendments to the Constitution, and provide that no person shall be "... deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V, XIV. The history of Due Process shows that it has long been equated with a fair trial and a "feeling of just treatment." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162, 71 S.Ct. 624 (1951) (Frankfurter, J. concurring). The facts surrounding

the petitioner's case require this Court to question whether the decisions of the appellate courts of Pennsylvania afforded justice and fundamental fairness to Petitioner Fiore.

I. Petitioner's due process rights were violated when the Commonwealth of Pennsylvania revised its theory of liability after 10 1/2 years of litigation

Procedural due process requires adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976); Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786 (1971) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)). Further, "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivation of a protected interest." Carey v. Piphus, 435 U.S. 247, 261-262, 98

S.Ct. 1042, 1050 (1978). The phrase "due process of law" implies that a person will receive fair treatment and a procedure designed to achieve a just result. Petitioner's case raises more than a question as to justice and unfair deprivation of a protected interest.

For ten-and-a-half years, Petitioner defended himself against the Respondent Commonwealth's single theory of tax fraud. Respondent maintained that Petitioner did not qualify as a tax-exempt common carrier because it served only one customer. Then, after Petitioner had exhausted all administrative procedures including administrative appeals, and created the factual record necessary to respond to the Respondent's single theory on appeal to the Commonwealth Court, the Respondent shifted theories. For over ten years, Petitioner had tailored his evidentiary gathering and maintenance to the Respondent's theory, only to have it changed at the proverbial eleventh hour. Such conduct by the Respondent, as condoned by

the courts of Pennsylvania, violated all principles of fundamental fairness and due process.

A. The Commonwealth of Pennsylvania admitted the validity of the petitioner's defense

In its proceedings against the petitioner, Respondent repeatedly professed one claim as the basis of the Petitioner's liability. That claim rested on the Respondent's assertion that Petitioner was not a tax exempt common carrier because he hauled for predominantly one customer. Throughout a decade of administrative proceedings, Petitioner maintained as his defense that he qualified for an exemption as a common carrier, despite hauling for primarily one customer. Throughout the first ten years of this litigation, Respondent stood by its theory of the Petitioner's liability.

The only basis for the Commonwealth of Pennsylvania, Department of Revenue Appeals Board's

decision, upholding Plaintiff's liability was that Petitioner's defense was statutorily invalid. In its decision, the Board specifically stated that "... in those instances where a 'Class D' common carrier performs hauling services predominantly for a single customer, it is not entitled to claim the public utility exemption." In the subsequent appeal, the Department of Revenue Appeals Board again relied on the Commonwealth's theory of liability. The Board stated "... that in those instances where a common carrier performs hauling services predominantly for a single customer, he is not entitled to claim the public utility exemption."

Throughout this period of time, Petitioner consistently defended that hauling for primarily one customer did not disqualify him from the common carrier exemption.

In its Memorandum of Law to the Commonwealth Court on Petitioner's appeal, Respondent reversed its long-

held position and admitted that Petitioner was correct on this interpretation of the law. The Respondent stated that it "... agrees that nothing in the definitional section requires that a common carrier perform for any particular number of customers." In this brief statement, Respondent sustained petitioner's defense of ten years.

B. Pennsylvania law precludes changing theories of liability on appeal

The Pennsylvania Commonwealth Court violated petitioner's due process rights in allowing the case to continue after Respondent made this admission. After admitting the validity of the Petitioner's defense, Respondent proceeded to change liability theories at subsequent evidentiary hearings. The Commonwealth Court errantly permitted this, thereby violating the Petitioner's due process rights, thereby erasing a decade of defense and allowing Petitioner, by then incarcerated, to

endure a sudden and massive fiscal reversal at the whim of the state.

Chapter 15 of the Pennsylvania Rules of Appellate Procedure sets forth guidelines for judicial review of governmental agency determinations.

Pennsylvania Rule of Appellate Procedure 1551(a) speaks to the scope of review of quasi-judicial orders. It provides, in part: "No question shall be heard or considered by the [Commonwealth] court which was not raised before the government unit."[1] Rule 1571(h), which deals specifically with Commonwealth Court review of Board of Finance & Revenue decisions, also limits the scope of review to questions which were raised and preserved in the administrative process, with certain exceptions not relevant here. Pa. R.A.P. 1571(h).

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[1]Both Pa.R.A.P. 1551(a) and 1571(h) provides for exceptions to the limited scope of review, none of which are relevant here.

Due diligence, and these Rules, require the Commonwealth to include all allegations and theories of liability during the administrative proceedings against a taxpayer. Its failure to do so violates both the Rules, Pennsylvania case law, and the theory of fundamental fairness by government and implicates due process. As the Pennsylvania Supreme Court stated in DeMarco v. Jones & Laughlin Steel Corp., 522 A.2d 26 (Pa. 1987), legal issues and facts not presented to the referee during the administrative process (a workers' compensation claim) cannot be asserted on appeal without sacrificing the integrity of the administrative scheme. Likewise, in Kindle v. Commonwealth State Board of Nurse Examiners, 515 A.2d 1342 (Pa. 1986), the Court recognized that, in general, the failure to raise a certain defense during the administrative process precluded its consideration on appeal. The recognized exception to this rule is where such questions could not, by the exercise of due diligence,

have been raised before the agency. See, Gateway School Dist. v. Com. Dept. of Educ., 559 A.2d 118 (Pa.Cmwlth. 1989).

Similarly, in Kimmel v. Somerset County Commissioners, 333 A.2d 777 (Pa. 1975), the Court stated, "It is a fundamental principle of appellate review that we will not reverse a judgment or decree on a theory that was not presented to the trial court." See, Altman v. Ryan, 257 A.2d 583, 585 (Pa. 1969). Respondent should have been precluded by the Commonwealth Court from raising and asserting these new theories of liability at that point in the proceedings.

As a result of Rules 1551 and 1571 and the preclusion traditions of Pennsylvania case law, the Commonwealth Court erred in permitting Respondent to introduce new theories in the appellate and subsequent proceedings. The Commonwealth Court should have found for the Petitioner as Respondent had presented no

other theories upon which to base its case during the administrative process. Instead the Court erroneously permitted Respondent to charge its posture to include two additional liability theories that never had been addressed at prior administrative proceedings. The Commonwealth Court then gave Petitioner an inadequate amount of time to respond to the Respondent's new avenues. On appeal, the Supreme Court of Pennsylvania compounded this error in remanding the action for further proceedings, rather than dismissing the charges against Petitioner.

C. Due process would bar further action by the state

The concept of due process is elastic and flexible, and must be adapted to countless different contexts.

> "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American

> constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, and past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Committee v. McGarth, 341 U.S. at 162-63 (Frankfurter, J., concurring).

Likewise here, Petitioner's due process claim does not fit within an easily defined construct of due process analysis. It is necessary for the Court to consider the overall dominant constitutional paradigm that no governmental action is permitted to interfere with property and liberty without due process, best understood as fundamental fairness.

Petitioner's due process analysis herein is akin to

the concept of res judicata.

The doctrine of res judicata states that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981) (citations omitted).

After Respondent admitted that Petitioner was not liable for tax evasion under the theory it had pressed for over ten years, through the completion of the administrative process, the Pennsylvania Courts should have precluded Respondent from continuing to press its claim, and from victimizing Petitioner. Respondent's admission, on appeal, that Petitioner was not liable under the only theory of liability that it had presented, should have resulted in a quick reversal of the Appeals Board's decision. By allowing Respondent to alter its theory of liability, the Commonwealth Court essentially gave

Respondent carte blanch to relitigate the issues of the petitioner's liability. However, the liability issue already had been decided when Respondent admitted to the validity of the petitioner's defense, thereby precluding further action. The Commonwealth Court and later the Pennsylvania Supreme Court, violated the petitioner's rights by permitting Respondent to change theories of liability at the appeal stage.

Respondent submitted new theories that the Petitioner did not hold a PUC license, and that his records were not maintained in a proper fashion. At no time in the proceedings of ten years, did Respondent state these claims. Respondent's "new theories" were not supported by any evidence of record. In fact, Petitioner had held a PUC license since the 1950's. Further, the narratives of both audit reports of Petitioner's business made no suggestions of liability on the basis of poor record keeping.

In essence, Respondent had never before submitted into the record any evidence on which to base these new theories. In the original action by the Pennsylvania Department of Revenue, and the subsequent appeal to the Board of Appeals, there is no mention of these theories. In both decisions by the Board of Appeals, the sole basis for determining liability rests on the "one customer" theory advanced by Responded. Such judicial conduct was and is conducive to unbridled state power.

The Commonwealth Court and the Pennsylvania Supreme Court erred in permitting Respondent to advance new theories that should have been barred by the doctrine of res judicata, and fundamental fairness. Such judicial conduct was and is conducive to unbridled state power.

In Mathews v. Eldridge, this Court stated that the "essence of due process is the requirement that a 'person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." 424 U.S. at 349

(quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. at 171-172 (Frankfurter, J., concurring)). Surely, this Court did not envision due process to allow for the Commonwealth of Pennsylvania to adopt new theories ten years into the appeals process and in the face of contrary Pennsylvania law. To allow such action would be violative of the simple and fair justice that due process provides. Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975 (1990). Petitioner requests this Court dismiss the assessment against him on the grounds that the Pennsylvania appellate courts erred in permitting the Commonwealth of Pennsylvania to change its claims of liability after admitting to the validity of the petitioner's defense.

II. Petitioner was denied Due Process when the Commonwealth Court failed to afford him adequate access to his records on remand

III. Petitioner was denied due process when the Commonwealth Court failed to create a record of documents proffered by Petitioner

Subsequent to Respondent's change in theory, the Commonwealth Court gave Plaintiff only twenty days to prepare for an evidentiary hearing on the new theories. On appeal from the Commonwealth Court's affirmance of the Board of Review's decision, the Superior Court of Pennsylvania ruled that the Commonwealth Court's procedure denied Petitioner due process.

The Pennsylvania Supreme Court specifically addressed this issue, stating:

> During the ten years following the first audit, there had never been any contention that Fiore was not a common carrier, was guilty of poor record keeping, or lacked a license or certification. When the Commonwealth Court determined that a common carrier may haul predominantly for one customer, the Commonwealth was permitted to adopt the latter arguments--after discovery and a mere twenty days before the evidentiary hearing in the Commonwealth Court."

Fiore v. Com. Bd. of Fin. and Rev., 633 A.2d 1112, 1113

(Pa. 1993).

The Supreme Court remanded Petitioner's case for "a new hearing at which Fiore will be given the opportunity to prove his entitlement to exemption from the sales and use tax, after receiving sufficient notice to search his records and prepare documentation of his claimed entitlement." Id. at 1115.

On remand, the Commonwealth Court again denied Petitioner, who was then incarcerated on other charges, an adequate opportunity to review and organize his documents. The Court compounded its error when it failed to accept documents proffered by Petitioner during the hearing and make them a part of the record.

While there is a reluctance to define due process for fear that the definition may be interpreted in a way that would limit or restrict its application in a particular case, there are several well-recognized elements of a fair hearing, as set forth by Judge Henry Friendly of the

United States Court of Appeals for the Second Circuit.

These include:

1. An unbiased tribunal;
2. Notice and grounds for the proposed action;
3. An opportunity to show why the proposed action should not be taken;
4. The right to call witnesses;
5. The right to know opposing evidence;
6. The right to have the decision based only on the evidence presented;
7. The opportunity to be represented by counsel;
8. **A record of the proceeding**;
9. A statement of reasons;
10. Public attendance; and
11. Availability of judicial review.

Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279-1295 (1975) (emphasis added).

The right to a preserved record, and access thereto, has long been recognized by this Court. For example, in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956), this Court held that due process and equal protection mandate that the State must provide an indigent defendant with a copy of his or her trial transcript. The Court recognized

that denial of a transcript, or its equivalent, would effectively preclude a defendant's access to the appellate process. Similarly, in Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970), this Court ruled that a preliminary hearing is a critical stage to which every defendant is entitled to counsel. The Court's rationale was based, in part, on the fact that the record produced at the preliminary hearing was deficient in that it did not reflect important facts. Had the defendant had counsel, the Court reasoned, such deficiency in the record may not have occurred.

This Court has perceived the essential due process requirement of the creation of a full and complete record in the civil context, also. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 58-59, 94 S.Ct. 1011, 1024 (1974), this Court set forth basic, due process elements of a judicial proceeding which differentiate it from arbitration, including: the creation of a complete record, application

of rules of evidence, rights to full discovery, compulsory process, cross-examination and testimony under oath. In Alexander, this Court ruled that employment arbitration agreements could not supplant an employee's right to full statutory review under Title VII of the Civil Rights Act of 1964. Nor should a federal court defer to the findings and conclusions of the arbitrators because arbitration proceedings did not afford the full panoply of process necessary to create a complete record on review.

The function of notice under due process "is to apprise an affected individual of, and permit adequate preparation for, an impending hearing" which may affect their legally protected interests. Memphis Light, Gas, & Water Division v. Craft, 436 U.S. 1, 14, 98 S.Ct. 1554 (1978). Notice is meaningless unless it affords one the time and possibility to "adequately prepare" for a hearing.

Obviously, the Commonwealth Court's failure to afford Petitioner access to his records and its refusal to

create an evidentiary record during the hearing does not comport with these fundamental elements of due process. The hearing that occurred affords no confidence that Petitioner's documentary evidence was considered, or that it was anything but a show and sham designed to allow the smooth separation of Petitioner from his earnings.

Petitioner was given no more time to prepare his defense, even though time did elapse between the hearings, because he was incarcerated. Petitioner proceeded pro se during the second evidentiary hearing: thus, this access was vital.

Not only did the Commonwealth Court breach constitutional principals of due process, but also failed to follow its own statutory mandate. Pursuant to 42 Pa.Con.Stat. § 564, that Court's obligation at a hearing was to "receive the evidence" that the Commonwealth Court failed to do. In Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc., 639 A.2d 440

(Pa. 1994), the Supreme Court of Pennsylvania recognized that the lower court, on review of an administrative agency decision, had a "duty" to receive into the record any evidence proffered by a party. Id. at 442. Petitioner here asked that his documents be made a part of the record, which the Commonwealth Court failed to do.

CONCLUSION

This Court has further stated that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593 (1972). In denying the petitioner access to his records to adequately prepare his defense, the Commonwealth Court was callous to the special circumstances surrounding the petitioner; namely, that the petitioner, appearing pro se, was incarcerated at the time of trial. As a result of this incarceration, the petitioner was unable to access the records in order to

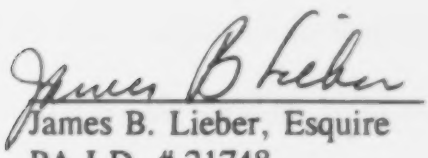
prepare his defense to the new liability theories.

In addition, the Commonwealth Court should have considered that the Commonwealth of Pennsylvania changed liability theories ten years into the litigation. These circumstances surrounding the petitioner's case required the Commonwealth Court to be more flexible in providing procedural protection. The Commonwealth Court should have provided or insured the petitioner greater access to his records.

Finally, because Petitioner proceeded pro se, the Commonwealth Court should have assisted him insofar as ensuring that the records he presented during that hearing were made a part of the record; it did not do so. Such failure clearly violates due process dictates which require the creation of a record as a fundamental element of due process.

Respectfully submitted,

LIEBER & HAMMER, P.C.



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William FIORE, t/a Fiore Trucking and Contracting, Petitioner, v. COMMONWEALTH of Pennsylvania, Respondent.

William M. FIORE, d/b/a Fiore Trucking and Contracting, Petitioner, v. COMMONWEALTH of Pennsylvania, Respondent (Two Cases)

Nos. 925 C.D. 1980, 895 C.D. 1985, 1029 C.D. 1985

Commonwealth Court of Pennsylvania

141 Pa. Commw. 578; 596 A.2d 1147; 1991 Pa. Commw. LEXIS 441

June 14, 1991, Argued August 7, 1991, Decided

August 7, 1991, Filed

SUBSEQUENT HISTORY: [***1]

As Corrected September 5, 1991.

PRIOR HISTORY:

Appealed from No. RST-3470 and RST-8153; State Agency Board of Finance and Revenue.

COUNSEL: Henry G. Beamer, for petitioner.

Clinton G. Smith, Jr., Deputy Atty. Gen., for respondent.

JUDGES: Craig, President Judge, and Colins, J., and Narick, Senior Judge. Pellegrini, J., did not participate in the decision in this case.

OPINION BY: NARICK

OPINION: [*580] [**1148]

This matter comes to us on appeal from three separate orders of the Board of Finance and Revenue (Board) sustaining the sales and use tax assessments imposed against William M. Fiore d/b/a Fiore Trucking and Contracting Company (Taxpayer). n1 The tax assessments, interest and penalties found owing by the Board are:

No. 895 C.D. 1985 =	$ 1,265,635.16
No. 925 C.D. 1980 =	304,390.11
$LNo. 1029 C.D. 1985 =	114,865.12
TOTAL	$ 1,684,890.39

Although William Fiore owns a number of business entities, these assessments were made only against William Fiore, t/a Fiore Trucking and Contracting, and that is the only enterprise with which we are now concerned. We affirm.

- - - - - - - - -Footnotes- - - - - - - - - - - -

n1 Taxes were assessed pursuant to Section 202 of the Tax Reform Code of 1971 (Code), Act of March 4, 1971, P.L. 6, as amended, 72 P.S. @ 7202.

- - - - - - - -End Footnotes- - - - - - - - - -

Cases appealed to this Court from determinations of the Board of Finance and Revenue are de novo and are governed by Pa.R.A.P. 1571; Bruce & Merrilees Electric Co. v. Commonwealth of Pennsylvania, 109 Pa. Commonwealth Ct. 101, 530 A.2d 994 (1987). According to the provisions of that rule, the Board does not certify a record to us; rather, the parties are directed to file stipulations of agreed facts and to identify the facts, if any, which must be tried. If necessary, this Court conducts an

evidentiary hearing under Pa.R.A.P. 1542(b) to resolve facts in dispute.

[*581]

In this particular case, the parties filed partial stipulations of fact in which they admitted the truth of the Department of Revenue audit reports and supporting work papers upon which the assessments were made, but reserved the right to object to the materiality or relevance of those documents. The parties were unable to agree to facts which would establish Taxpayer's right to exemption from taxation or to a credit for taxes already paid on certain of the items listed in the audit reports. Consequently, the Court heard testimony and received evidence on these issues. From the [***3] partial stipulations of fact and credible hearing evidence, we find the following relevant facts.

FINDINGS OF FACT

1. Fiore Trucking & Contracting Co. is a sole proprietorship owned and operated by William Fiore, and engaging in the business of hauling property by motor vehicle.

2. William Fiore also owns and operates the following sole proprietorships:

a. Diamond Excavating & Hauling, which has no apparent business activity;

b. Diamond Fuel, which has no apparent business activity, but is operated only to keep the payroll records for Fiore Trucking & Contracting separate;

c. Mill Industrial Service Co., which is engaged in the business of transporting property by motor vehicle; and

d. Rolling Hills Village, which is engaged in the business of operating a mobile home park.

[**1149] 3. William Fiore is also the sole stockholder of Bill's Trucking, Inc., a Pennsylvania corporation engaged in the business of transporting property by motor vehicle.

4. In addition to the above-mentioned business entities, William Fiore also used other business names, among them, Fiore Construction, Diamond Excavating and others, but there was no indication of what business activities these
entities [***4] pursued.

[*582] 5. Bill's Trucking, Inc. is licensed as a motor

vehicle common carrier under PUC License No. A81360.

6. William M. Fiore t/a Mill Industrial Service Co. is licensed as a motor vehicle common carrier under PUC License No. A75776. At the request of Mr. Fiore, that license was transferred from William Fiore individually to William M. Fiore t/a Mill Industrial Service Co. by order of the PUC dated August 20, 1974.

7. William Fiore holds Sales and Use Tax License No. 89-09117-2.

8. William Fiore d/b/a Rolling Hills Village holds Sales and Use Tax License No. 02-90776-2.

9. The Department conducted a field audit to examine Taxpayer's records for the period of January 1, 1975 through September 30, 1978, and that audit led to the

assessment of additional taxes, penalties and interest at No. 925 C.D.1980 as follows:

TAX ON:	AMOUNT
Liquid Fuel	$ 26,732.59
Depreciable Equipment	46,754.51
Parts, Tires & Repair	143,254.16
Subtotal	$ 216,741.26
Interest	35,038.99
Penalty	52,609.86
TOTAL	$ 304,390.11

10. The Department conducted a field audit to examine Taxpayer's records for the period of October 1, 1978 through December 31, 1981, and that [***5] audit led to the assessment of additional taxes, penalties and interest at No.

895 C.D.1985 as follows:

TAX ON:	AMOUNT
Liquid Fuel	$ 81,412.21
Depreciable Equipment	283,114.16
Parts, Tires & Repair	265,336.08
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Truck Leasing	182,670.07
Subtotal	$ 831,207.28
Interest	226,626.01
Penalty	207,801.87

TOTAL	$ 1,265,635.16

[*583]

11. As a result of the field audit for the period of October 1, 1978 through December 31, 1981, a second examination of Taxpayer's record was conducted, and an additional assessment of taxes, penalties and interest was made at No. 1029 C.D.1985 as follows:

TAX ON:		AMOUNT
Liquid Fuel		$ 81,728.57
	Subtotal	$ 81,728.57
	Interest	24,963.68
	Penalty	8,172.86
	TOTAL	$ 114,865.12

12. The Taxpayer's administrative appeals brought relief of penalty abatement in the matter at 925 C.D.1980 and in the second use tax assessment the deficiency was reduced to "Use Tax -- $ 770,495.79, plus appropriate interest and penalties." The Fuel Use Tax assessment was sustained in its entirety.

13. Taxpayer purchased the liquid fuel, depreciable equipment, parts, tires, repairs, mobile homes, airplane, [***6] and other property, and also leased certain trucks, all of which transactions provide the basis for the aforementioned tax assessments.

14. There is no credible evidence of record that Taxpayer is engaged in manufacturing nor that Taxpayer used the aforementioned assets directly in the manufacturing processes of another. Further, Taxpayer did not raise or preserve the question of the applicability of the

manufacturing or resale exclusions before the administrative agency.

15. There is no credible evidence of record that Taxpayer remitted any taxes in connection with the aforementioned assessed goods or services which would entitle Taxpayer to a credit for taxes paid.

[**1150] 16. Taxpayer does not hold a PUC Common Carrier Certificate.

17. Taxpayer failed to segregate its business activities from other business enterprises owned and operated by William M. Fiore.

[*584]

18. Taxpayer failed to keep adequate business records as

required by statute and regulations.

ISSUES

Taxpayer raises the following issues for our consideration: n2

1. Whether the Board erred in determining that Taxpayer was not a common carrier because it served predominantly one customer;

2. Whether one who [***7] holds a PUC certificate as a common carrier but serves predominantly one customer is entitled to claim the PUC exemption;

3. Whether Taxpayer is entitled to the exemption provided for property used directly in manufacturing;

4. Whether the Department erred by basing their conclusions and resulting tax assessments on a comparison of Taxpayer's tax returns with annual reports filed with the PUC because those returns and reports are hearsay;

5. Whether the Commonwealth Court erred by permitting the Department to raise new issues twenty days before the evidentiary hearing when it refused to let Taxpayer do the same;

6. Whether there were numerous due process violations committed throughout the proceeding.

- - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n2 Many other issues have been referred to in one manner or another by Taxpayer throughout these

proceedings including a credit for taxes paid on some mobile homes and the propriety of tax on an airplane and many other matters. These other matters have not been properly briefed, but we note that the evidence of record does not sustain any entitlement to a credit for taxes paid, that the airplane was improperly taxed, or any other ancillary matters.

With regard to the airplane, Taxpayer alleged that the plane was bought for resale and therefore no tax was due. There is no credible evidence that the plane was resold.

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

[***8]

DISCUSSION

The general rule is that the burden is on the

taxpayer to prove that the tax was improperly assessed and the Commonwealth [*585] has no duty to prove the validity of the assessments. Section 236 of the Code, as amended, 72 P.S. @ 7236; Bruce & Merrilees Electric Company. In the case now before us, Taxpayer has failed to satisfy that burden by proving its assertion that its assets were used directly in common carrier service. Section 201(k)(8) of the Code, as amended, 72 P.S. @ 7201(k)(8).

The principal thrust of Taxpayer's appeal is premised on an entitlement to an exemption on the basis that it holds a PUC certificate as a common carrier. n3 The first [**1151] two issues raised by Taxpayer are based on that exemption. The simple truth is, however, that Taxpayer had no such certificate at any time encompassed by the audit report. Consequently, Taxpayer is not entitled to the PUC common carrier exemption.

- - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n3 Section 201(k)(8) of the Code, as amended, 72 P.S. @ 7201(k)(8) provides in part:

The term 'sale at retail' shall not include (i) any such transfer of tangible personal property or rendition of services for the purpose of resale, or (ii) such rendition of services or the transfer of tangible personal property including, but not limited to, machinery and equipment and parts therefor and supplies to be used or consumed by the purchaser directly in any of the operations of -- (A) the manufacture of personal property;

. . . .

(C) The producing, delivering or rendering of a public

utility service, or in constructing, reconstructing, remodeling, repairing or maintaining the facilities which are directly used in producing, delivering or rendering such service;

. . . .

The exclusions provided in paragraphs (A), (B), (C) and (D) shall not apply to any vehicle required to be registered under The Vehicle Code, except those vehicles used directly by a public utility engaged in business as a common carrier; . . .

The exclusions provided in paragraphs (A), (B), (C) and (D) shall not apply to tangible personal property or services to be used or consumed in managerial sales or other nonoperational activities, nor to the purchase or use of tangible personal property or services by any person other than the person directly using the same in the

operations described in paragraphs (A), (B), (C) and (D) herein. The exclusion provided in paragraph (C) shall not apply to (i) construction materials, supplies or equipment used to construct, reconstruct, remodel, repair or maintain facilities not used directly by the purchaser in the production, delivering or rendition of public utility service.

. . .

- - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

[***9]

[*586]

For whatever reason, Mr. Fiore has elected to organize his business affairs by establishing a number of separate entities. One of those entities, Bill's Trucking Inc., is incorporated and holds a PUC certificate for common carrier service. Another entity, Mill Industrial Services

also holds a PUC certificate for common carrier service. The business audited in this case, Fiore Trucking and Contracting Services, holds no PUC certificate. n4

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n4 Taxpayer did apply in October 1979 for a PUC certificate "for the right to begin to transport, as a contract carrier, by motor vehicle, concrete products and products used or useful in the manufacture, production and/or assembly of concrete products, for Pittsburgh Flexicore Company, Inc., from its facilities in the City of Monongahela, Washington County, to points in Pennsylvania, and vice versa." Commonwealth's Exhibit 1. Taxpayer indicated on the application that it did not then hold any PUC certificate. The PUC approved Taxpayer's application by order adopted March 21, 1980, and entered March 27, 1980, provided however, that Taxpayer comply

with certain requirements of the PUC. Apparently, Taxpayer never complied with those requirements and the record was closed by the PUC before Taxpayer ever met those requirements. Id. Thus no contract carrier certificate was issued.

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[***10]

Taxpayer treats the PUC licenses of Mill Industrial Services and Bill's Trucking Inc. as "floating authority" which were used by Mr. Fiore for whichever of his business concerns as he saw fit. Therefore Taxpayer argues, equipment owned by Taxpayer was used by the other business entities owned and operated by Mr. Fiore which had PUC certificates and Taxpayer is entitled to the PUC exemption. We reject this argument. n5

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n5 We do not mean to suggest that it would be proper for a licensed common carrier to use the assets of other non-regulated carriers in common carrier service. Since there is no evidence of such use in this case, however, we do not need to address the matter.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

In 1979, Fiore Trucking and Contracting applied for a contract carrier's certificate. Taxpayer reported on its application that it owned "247 licensed (Penna.) vehicles." Commonwealth's Exhibit 1. For that same year, Bill's Trucking Inc. reported to the PUC that it owned sixteen trucks, and Mill Industrial Services reported it owned fourteen [***11] trucks. (Stipulation of Facts filed at No. 895 C.D. 1985.) Clearly, there is a significant disparity

between [*587] these statements made to the PUC by these various Fiore enterprises, and the allegations that Taxpayer now makes -- that the majority of its assets were used directly in common carrier service.

Taxpayer also offered in evidence hundreds of documents labelled "Scale Ticket" and carrying United States Steel Corporation's (USS) name and logo. Supposedly these were offered to prove that Taxpayer was engaged in common carrier service for USS. These documents, however, failed to identify the name of the carrier or shipper. Adding to the uncertainty of which entity actually performed the services related to these scale tickets are the voluminous USS "accounts payable remittance listings" entered in evidence showing payments made to Mill Industrial Services, Bill's Trucking Inc., as well as Taxpayer. Commonwealth's Exhibit 2. Since it is evident from these listings that USS

was making payments to all three entities during the relevant period, it is impossible to link the nameless scale tickets to any of the three businesses. [***12] Fiore attempted to link the two with his testimony, but that self-serving testimony is not credible since the records were so incomplete and intermingled that we do not believe that anyone could say for certain which records correspond to which business entity. We are satisfied that there is no credible competent evidence of record which would sustain Taxpayer's asserted right to the PUC exemption contained in his first two issues.

Taxpayer's third argument is that he is entitled to an exemption because its assets were used directly in manufacturing. n6 Taxpayer itself does not engage in manufacturing, but instead bases this argument [**1152] on its role allegedly transporting goods for USS. Since we have already determined that the evidence does not

demonstrate that such a role exists, however, this issue also
fails for insufficiency of proof.

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n6 See footnote 3 herein.

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

[*588]

The fourth issue questions the propriety of an auditor basing his assessments on a comparison of Taxpayer's tax returns to annual reports [***13] filed with the PUC by other entities because those documents are hearsay. This argument must fail for two reasons. First, Taxpayer stipulated to the audit reports and their supporting working papers. Since it has accepted the truth of these documents,

Taxpayer may not now raise issues attacking their truth.

Second, the auditors were conducting an examination of the Taxpayer's records to verify that all was in order. It is the very nature of auditing to look for discrepancies in those records. That is what auditors do. If Taxpayer's records are not copacetic, it may not be heard to complain that the auditors based their audit findings on the errors or misstatements of its own records.

The fifth issue raised by Taxpayer alleges that the Commonwealth was permitted to raise new issues twenty days before the hearing, and that Taxpayer was denied the same right. This is an inaccurate account of what transpired in this case. The parties stipulated to the tax assessments and the purpose of the evidentiary hearing was to establish the Taxpayer's entitlement, if any, to an exemption or credit. The Commonwealth has refuted and

rebutted Taxpayer's

assertions, but it has not been permitted [***14] to raise new issues. The Commonwealth's case was established by the audit reports which Taxpayer admits are true. Consequently, we reject Taxpayer's characterization of the proceedings.

Taxpayer has raised many issues purportedly grounded in the Due Process Clause and which relate to the methods used by the revenue auditors to calculate the tax deficiency. For example the Taxpayer complains that 1) the auditors relied on hearsay to support their assessments; 2) Taxpayer did not have an opportunity to confront the third parties with whom the auditors spoke to get independent verification of information during the audit; 3) Taxpayer did not

have an opportunity to cross-examine those same persons; 4) that the auditor did not have knowledge of PUC law;

and [*589] 5) that the auditors' supervisor allegedly instructed the auditors to tax everything. These complaints do not prove a due process violation.

Due process is a flexible concept and the nature of the process that is mandated by that concept will vary depending on the particular circumstances of the case. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Where, [***15] as here, the interest at stake is a property interest there is no due process guarantee of a hearing before the property is taken, but only the guarantee of a hearing at some meaningful time. Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). When the case involves a taxing authority's power to assess and collect taxes, there is no right to a hearing before the taking occurs. Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); LAL v. West

Chester Area School District, 71 Pa.Commonwealth Ct. 236, 455 A.2d 1240 (1983).

In this case Taxpayer was afforded the opportunity to litigate his appeal before the Board and in a de novo hearing before this court on appeal. At both of these stages the rights that Taxpayer claims it was denied at the audit stage -- confrontation, cross-examination, and hearsay protections -- operated to protect Taxpayer from an improper assessment. Due process requires no more. Due process does not guarantee that auditors conduct their reviews under the rules of court, they must necessarily [***16] rely on out-of-court statements, and there exists no right to cross examine or confront witnesses until the matter comes to a hearing.

Finally, Taxpayer also argues that there is a due process violation since the presumption in favor of the propriety of

the tax assessments deprives it of the opportunity to challenge the proof of the matter presumed, i.e., the assessment. This [**1153] argument is without merit since Taxpayer has stipulated to the truth of the audit reports and the supporting schedules detailing the items of property and [*590] services purchased by Taxpayer during the period covered by the audit. These reports detail the business transactions which provide the basis for the tax and would be sufficient to sustain the tax, unless an exemption were applicable. Since the Taxpayer has stipulated to the same matters that are the subject of the presumption, it may not now argue that the presumption is improper.

Instead of challenging the truth of the transactions underlying the tax, the Taxpayer has elected to assert its right to an exemption and a credit for taxes paid. The generally accepted rule is that a taxpayer must bear the

burden of proving entitlement [***17] to a tax exemption. United States v. Wells Fargo Bank, 485 U.S. 351, 108 S.Ct. 1179, 99 L.Ed.2d 368 (1988); Container Corporation of America v. Franchise Tax Board, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983). This principle is well established and does not offend due process. Id. As we noted above, Pennsylvania also follows this rule regarding exemptions. Bruce & Merrilees Electric Company. Since the facts which would warrant an exemption are more readily available to the Taxpayer, we see no due process problem in that rule.

Throughout these proceedings, the Court has endeavored to afford the Taxpayer every opportunity to prove its allegations. With each new offer of proof and each new development in the case, however, we became more and more convinced that this appeal was totally without merit. Yet, the opportunity to come forward with

evidence and to prove his arguments was fully extended to Taxpayer. We are satisfied that Taxpayer has had the process it was due, and that the process has been fair. The Taxpayer's failure to conduct its affairs in an orderly manner and [***18] to keep adequate records has made its burden of proof impossible to sustain. The blame for that failure lies with the Taxpayer. Accordingly, we affirm.

ORDER

AND NOW, this 7th day of August, 1991, the order of the Board of Finance and Revenue in the above-captioned matter is hereby affirmed.

[*591]

It is further ordered that unless Exceptions are filed

within thirty (30) days from the date of this order, the Chief Clerk shall enter judgment in favor of the Commonwealth in the following amounts:

925 C.D. 1980

Use Tax -- $ 216,741.26 plus appropriate interest

895 C.D. 1985

Use Tax -- $ 770,495.79 plus appropriate interest and penalties

1029 C.D. 1985

Fuel Use Tax -- $ 81,728.57 plus appropriate interest and penalties

William FIORE, t/a Fiore Trucking and Contracting, Petitioner, v. COMMONWEALTH of Pennsylvania, Respondent

No. 925 C. D. 1980, No. 895 C. D. 1985, No. 1029 C. D. 1985

COMMONWEALTH COURT OF PENNSYLVANIA

148 Pa. Commw. 62; 609 A.2d 862; 1992 Pa. Commw. LEXIS 364

February 5, 1992, Argued

May 12, 1992, Decided

SUBSEQUENT HISTORY: [**1]

Reargument Denied June 10, 1992.

PRIOR HISTORY: APPEALED From No. RST-3470 and RST-8153. State Agency, Board of Finance and Revenue

COUNSEL: Henry G. Beamer, for petitioner.

Clinton G. Smith, Jr., Deputy Atty. Gen., for respondent.

JUDGES: Craig, President Judge, and Doyle, Colins, McGinley, Smith, Friedman and Kelley, JJ. Pellegrini, J., did not participate in this decision.

OPINION BY: COLINS

OPINION: [*65] Before the Court are exceptions filed by William M. Fiore, t/a Fiore Trucking and Contracting

(taxpayer) to an opinion and order of this Court dated August 7, 1991. Fiore v. Commonwealth, 141 Pa. Commonwealth Ct. 578, 596 A.2d 1147 (1991) (Fiore I). Therein the Court affirmed three separate orders of the Board of Finance and Revenue (Board) sustaining the use tax assessments imposed against taxpayer by the Department of Revenue (Department) pursuant to Section 202(b) of the Tax Reform Code of 1971 (Code). n1

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n1 Act of March 4, 1971, P.L. 6, as amended, 72 P.S. @ 7202(b), which states in relevant part:

There is hereby imposed upon the use, on and after the effective date of this article, within this Commonwealth of tangible personal property purchased at retail on or after the effective date of this article, and on those services described herein purchased at retail on and after the

effective date of this article, a tax of six per cent of the purchase price. . . .

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

[**2]

Taxpayer's appeals were heard de novo by the Court pursuant to Pa.R.A.P. 1571. The parties filed partial stipulations of fact and evidentiary hearings were held on February 4 and 5, 1991. The Court made the following findings of fact based on the partial stipulations of fact filed by the parties and credible [*66] evidence presented at the evidentiary hearings. We realize that these lengthy findings have been set forth previously in the Court's opinion in Fiore I; however, for purposes of clarity it is necessary to reiterate them here.

FINDINGS OF FACT

1. Fiore Trucking & Contracting Co. is a sole proprietorship owned and operated by William Fiore, and engaging in the business of hauling property by motor vehicle.

2. William Fiore also owns and operates tne following sole proprietorships:

a. Diamond Excavating & Hauling, which has no apparent business activity;

b. Diamond Fuel, which has no apparent business activity, but is operated only to keep the payroll records for Fiore Trucking & Contracting separate;

c. Mill Industrial Service Co., which is engaged in the

business of transporting property by motor vehicle; and

d. Rolling Hills Village, which is engaged in the business [**3] of operating a mobile home park.

3. William Fiore is also the sole stockholder of Bill's Trucking, Inc., a Pennsylvania corporation engaged in the business of transporting property by motor vehicle.

4. In addition to the above-mentioned business entities, William Fiore also used other business names, among them, Fiore Construction, Diamond Excavating and others, but there was no indication of what business activities these entities pursued.

5. Bill's Trucking, Inc. is licensed as a motor vehicle common carrier under PUC [Public Utility Commission] License No. A81360.

6. William M. Fiore t/a Mill Industrial Service Co. is licensed as a motor vehicle common carrier under PUC License No. A75776. At the request of Mr. Fiore, that license was transferred from William Fiore individually to William M. Fiore t/a Mill Industrial Service Co. by order of the PUC dated August 20, 1974.

[*67] 7. William Fiore holds Sales and Use Tax License No. 89-09117-2.

8. William Fiore d/b/a Rolling Hills Village holds Sales and Use Tax License No. 02-90776-2.

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10. The Department conducted a field audit to examine Taxpayer's records for the period of October 1, 1978 through December 31, 1981, and that audit led to the assessment of additional taxes, penalties and interest at No. 895 C.D.1985 as follows:

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	Subtotal	$ 831,207.28
	Interest	226,626.01
	Penalty	207,801.87
	TOTAL	$ 1,265,635.16

11. As a result of the field audit for the period of October 1, 1978 through December 31, 1981, a second examination of Taxpayer's record was conducted, and an additional assessment [*68] of taxes, penalties and interest was made at No. 1029 C.D.1985 as follows:

TAX ON:		AMOUNT
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	Subtotal	$ 81,728.57
	Interest	24,963.68
	Penalty	8,172.86
	TOTAL	$ 114,865.12

[**5]

12. The Taxpayer's administrative appeals brought relief of penalty abatement in the matter at 925 C.D.1980 and in the second use tax assessment the deficiency was reduced to "Use Tax -- $ 770,495.79, plus appropriate interest and penalties." The Fuel Use Tax assessment was sustained in its entirety.

13. Taxpayer purchased the liquid fuel, depreciable equipment, parts, tires, repairs, mobile homes, airplane,

and other property, and also leased certain trucks, all of which transactions provide the basis for the aforementioned tax assessments.

14. There is no credible evidence of record that Taxpayer is engaged in manufacturing nor that Taxpayer used the aforementioned assets directly in the manufacturing processes of another. Further, Taxpayer did not raise or preserve the question of the applicability of the manufacturing or resale exclusions before the administrative agency.

15. There is no credible evidence of record that Taxpayer remitted any taxes in connection with the aforementioned assessed goods or services which would entitle Taxpayer to a credit for taxes paid.

16. Taxpayer does not hold a PUC Common Carrier

Certificate.

17. Taxpayer failed to segregate its business activities [**6] from other business enterprises owned and operated by William M. Fiore.

[*69] 18. Taxpayer failed to keep adequate business records as required by statute and regulations.

The Court concluded that: (1) taxpayer was not entitled to the public utility exclusion from use and sales taxation; n2 (2) taxpayer was not entitled to the manufacturing exclusion; n3 (3) the auditors committed no impropriety in their method of preparing the audit report that formed the basis for the Department's conclusions and tax assessments; (4) taxpayer's allegation that the Commonwealth was permitted to raise new issues twenty days before the hearing and that taxpayer was denied the

same right was a mischaracterization of the proceedings; and (5) there was no evidence that taxpayer suffered any due process violation during the proceedings. The Court affirmed the order of the Board and further ordered that unless exceptions were filed within thirty days, judgment shall be entered in favor of the Commonwealth in the following amounts:

925 C.D. 1980

Use Tax -- $ 216,741.26 plus appropriate interest

895 C.D. 1985

Use Tax -- $ 770,495.79 plus appropriate [**7] interest and penalties

1029 C.D. 1985

Fuel Use Tax -- $ 81,728.57 plus appropriate interest and penalties

- - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n2 Section 201(o)(4)(B) of the Code provides an exclusion from use taxation for items of "machinery and equipment and parts therefor, and supplies" used directly in the "producing, delivering or rendering of a public utility service." This section further provides that the exclusion "shall not apply to any vehicle required to be registered under The Vehicle Code except those vehicles directly used by a public utility engaged in the business as a common carrier." 72 P.S. @ 7201(o)(4)(B). At all times relevant to this proceeding, taxpayer never held a PUC certificate for common carrier service. Further, the Court rejected taxpayer's argument that it was entitled to the PUC exemption based on the fact that two of its separate entities, Bill's Trucking, Inc. and
Mill Industrial Services, each held a PUC certificate for

common carrier service.

n3 Section 201(o)(4)(B) of the Code also provides that "machinery and equipment and parts therefor, and supplies" used directly in "[t]he manufacture of personal property" are excluded from the definition of "use" for purposes of taxation. 72 P.S. @ 7201(o)(4)(B).

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

[**8]

[*70] Taxpayer timely filed exceptions to the Court's opinion and order, which are now before the Court.

In addition, taxpayer presents the following issues for the Court's consideration: (1) whether the Department's auditor properly relied on double or triple hearsay as a factual basis for the assessment; (2) whether the Court

erred by accepting as true the conclusions set forth in exhibits attached to the

partial stipulation of facts; (3) whether taxpayer was denied procedural due process when the Commonwealth was permitted to raise new issues twenty days before the evidentiary hearing and taxpayer was denied that right; (4) whether the Court erred in finding that taxpayer failed to preserve the issue of its alleged entitlement to the manufacturing exclusion and furthermore, that even if the issue had been preserved, taxpayer's assertion that it was entitled to the manufacturing exclusion was unsupported by the record evidence; (5) whether taxpayer was denied procedural due process throughout these proceedings; and (6) whether the Court erred in failing to adopt taxpayer's proposed findings of fact, which taxpayer argues were supported by the evidence of record. We will address [**9] the issues seriatim and thereby address the corresponding exceptions as well, since the exceptions are,

for the most part, subsumed within the issues raised. The remaining exceptions will be addressed thereafter.

Taxpayer first argues that the second audit, covering the period October 1, 1978 through December 31, 1981, was based upon the following incidents, which constitute "unsupported multiple hearsay:" "(1) an unknown informant gathering information and communicating it to some other unknown person at United States Steel or to Mr. Skapik; (2) this unknown person supposedly informing Mr. Skapik, the auditor's supervisor, by telephone of the information; (3) Mr. Skapik, now deceased, writing this information and inserting it into the audit report and (4) the auditor of record, B. Kachmar, signing his name to this report as his own." Taxpayer's brief at p. 11. Additionally, taxpayer asserts in its Exception No. 11 that the Court improperly paraphrased the argument as alleging that the auditor's returns and reports were hearsay [*71]

when the actual issue raised concerned the "inclusion in the second audit report information inserted by a deceased supervisor, which information [**10] he allegedly received over the telephone from an unknown person of the U.S. Steel Corporation."

This argument pertains to certain alleged hearsay statements contained in the Narrative Report of Audit Findings prepared in conjunction with the field audit conducted for the period October 1, 1978 through December 31, 1981. The alleged hearsay information is emphasized in the following relevant portion of the report:

While [taxpayer's accountant] claimed majority of activities to be public utility activity, he did not supply purchase orders from and corresponding sales invoices to customers, for whom public utility services were performed.

In view of this, United States Steel Corporation was contacted and asked what type of activity the taxpayer performed for them. During 1979, 1980, 1981, practically all purchase orders and payments to Mill Industrial Service Company and William Fiore Contracting, were for the service of removal of industrial sludge or waste, including tar decanter sludge and sewer sludge.

Therefore, even though taxpayer reported to the PUC . . . approximately 53% of total receipts per cash receipts journal, . . . as PUC activity, it is obvious that the total amount [**11] reported to the PUC as PUC activity could not possibly be all PUC activity since a minimum of 90% of the U.S. Steel receipts were for waste disposal, which does not qualify for PUC activity. . . . Since the predominant use of the equipment is for non-PUC service, the equipment, parts, and repairs would be taxable.

Narrative Report of Audit Findings pp. 3-4 (emphasis added).

Taxpayer argues that because the language pertaining to U.S. Steel receipts was inserted into the narrative by a now deceased auditor, who obtained the information from an unknown person at U.S. Steel, it constitutes impermissible hearsay. According to taxpayer, the Department relied solely upon these hearsay statements as the basis for its imposition [*72] of the additional assessments and, therefore, the assessments are unsupported and cannot stand. n4

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n4 To the contrary, Mr. Kachmar, auditor for the Department, testified that the additional assessments were also based upon the previous audit report, covering the

period January 1, 1975 through September 30, 1978, and taxpayer's inadequate records.

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

[**12]

It is the Commonwealth's position that taxpayer has waived the hearsay argument, having not raised it previously in its petition for review or in the partial stipulation of facts to which the entire report was attached as Exhibit "A." This issue was first raised in taxpayer's brief in support of its petition for review and thus, was waived pursuant to Pa.R.A.P. 1571(h). However, the Court in Fiore I addressed the issue and determined that taxpayer's hearsay argument had no merit because (1) "Taxpayer stipulated to the audit reports and their supporting working papers," and thereby accepted the truth of those documents, which taxpayer may not now attack;

and (2) the auditors were merely examining taxpayer's records to look for discrepancies and if taxpayer's records were not in proper form, taxpayer may not now "complain that the auditors based their audit findings on the errors or misstatements of its own records."

According to taxpayer, the facts stipulated do not support the Court's conclusions. Taxpayer argues that it clearly stipulated to the facts that the audit was conducted by the Department and that attached to the stipulation and marked Exhibit "A" were true and correct [**13] copies of the audit and appended papers including schedules and worksheets, but that it never stipulated to the accuracy of the figures or conclusions contained in those documents.

A partial stipulation of facts was filed for each of the three docketed matters forming this consolidated appeal. The relevant language appears either in stipulation No. 4

or 5 depending on the docket number and reads as follows:

An audit was conducted by the Department of Revenue of the books and records of William Fiore for the period October 1, 1978, through December 31, 1981. Attached hereto, made a part hereof, and marked as Exhibit "A", is a [*73] true and correct copy of said audit and allied papers, including schedules and worksheets. Further, stipulation No. 11 or 12, again depending on the particular docket number, reads as follows: The parties hereto reserve the right to object to the relevancy or materiality of any Stipulation herein contained. It is evident from the language of the above-quoted stipulations that the Court erred in finding that taxpayer stipulated to the truth or accuracy of the audit reports. Accordingly, taxpayer's Exception No. 2, addressing this error, is granted. [**14] However, we conclude that this was harmless error, since even if the Court were to disregard the alleged hearsay

statements, taxpayer still did not meet its burden of showing entitlement to the public utility exclusion, as taxpayer produced no purchase orders or corresponding sales invoices to verify public utility services. The burden of accurate recordkeeping rests with the taxpayer. See Air Engineers, Inc. v. Commonwealth, 40 Pa.Commonwealth Ct. 472, 397 A.2d 854 (1979), aff'd, 494 Pa. 81, 428 A.2d 1341 (1981); 61 Pa.Code @ 34.2; Section 271 of the Code, 72 P.S. @ 7271. Accordingly, Exceptions Nos. 11, 21 and 25 are denied.

Taxpayer next argues that it was denied procedural due process when the Commonwealth was allowed to raise new issues up to and including twenty days before the evidentiary hearing and taxpayer was denied that same right. The thrust of taxpayer's argument appears to be that the Commonwealth was unfairly permitted to change the basis for its position that taxpayer was not entitled to the

public utility exclusion. According to taxpayer, the Commonwealth initially argued [**15] that taxpayer was not entitled to the exclusion because it predominantly served one customer, and following a determination that that reasoning was erroneous, the Commonwealth then argued that regardless, the assessments were proper because of taxpayer's poor record keeping and because taxpayer was not certified as a common carrier.

The Commonwealth established its case by the audit reports, and it was then incumbent on taxpayer to prove [*74] entitlement to an exclusion or credit. Ernest Renda Contracting Company v. Commonwealth, 94 Pa. Commonwealth Ct. 608, 504 A.2d 1349 (1986), rev'd on other grounds, 516 Pa. 325, 532 A.2d 416 (1987). Taxpayer has failed to satisfy its burden in this regard. Where, as here, a taxpayer presents no evidence to show

that entities with which it contracted are public utilities or that the specific materials upon which the assessment was based were to be used directly in providing a public utility service, it cannot qualify for the public utility exclusion from use tax under Section 201. Id. We can find no evidence that taxpayer was unfairly treated [**16] in these proceedings or denied the right to fairly present its case. Accordingly, we deny taxpayer's Exceptions Nos. 14 and 22.

Taxpayer's fourth argument is that the Court erred in (1) determining that taxpayer failed to preserve the issue of its entitlement to the manufacturing exclusion and has waived that issue; and (2) determining that regardless, taxpayer failed to carry its burden of showing that it was engaged in manufacturing or that its assets were used directly in manufacturing. According to taxpayer, it proved entitlement to the exclusion via testimony of Mr. Herbert

Wittman, former traffic manager at U.S. Steel, and Mr. Robert Corcoran, which testimony taxpayer asserts met his burden of proving that he had a public utility certificate, that he performed service as a common carrier, and that the waste material hauled at times was generated in the manufacturing process. We point out here that taxpayer's brief, in violation of Pa.R.A.P. 2132, fails to specifically reference those portions of testimony which it believes supports its assertions. "[I]t is incumbent upon the appellants, not the Court, to specifically correlate the allegations of error to the record and the [**17] exhibits." Stefanovits v. Magrino, 136 Pa.Commonwealth Ct. 290, 295, 583 A.2d 841, 843 (1990). Therefore, we are unable to address specifically the particular testimony that taxpayer argues is probative. Nevertheless, we can find no credible evidence of record to show that taxpayer was engaged in manufacturing or that taxpayer used its assets directly in the manufacturing process.

Therefore, Exceptions Nos. 7, 13 and 20 are denied.

[*75] Taxpayer's fifth argument raises a plethora of procedural due process violations it claims to have occurred throughout these proceedings. Taxpayer's discussion of this issue in its brief is at best a maze of convoluted statements from which we are unable to conduct any meaningful review. The Court in Fiore I thoroughly discussed and disposed of taxpayer's due process complaints concluding that: [i]n this case Taxpayer was afforded the opportunity to litigate his appeal before the Board and in a de novo hearing before this court on appeal. At both of these stages the right that Taxpayer claims it was denied at the audit stage -- confrontation, cross-examination, and hearsay protections -- [**18] operated to protect Taxpayer from an improper assessment. Due process requires no more. Due process does not guarantee that auditors conduct their reviews under the

rules of court, they must necessarily rely on out-of-court statements, and there exists no right to cross examine or confront witnesses until the matter comes to a hearing . . . . Throughout these proceedings, the Court has endeavored to afford the Taxpayer every opportunity to prove its allegations . . . . We are satisfied that Taxpayer has had the process it was due, and that the process has been fair. The Taxpayer's failure to conduct its affairs in an orderly manner and to keep adequate records has made its burden of proof impossible to sustain. The blame for that failure lies with the Taxpayer. Fiore I, 141 Pa.Commonwealth Ct. at 589-90, 596 A.2d at 1152-53. We are unable to find any merit to taxpayer's general, all encompassing allegations of due process violations. Accordingly, the relevant exceptions raised, Nos. 23, 24, 26, 28 and 30, are denied.

Regarding taxpayer's final argument that the Court erred in failing to adopt its proposed Findings of Fact which,

[**19] although presented in the Statement of Questions section, was never addressed in taxpayer's brief, suffice it to say that the Court is under no obligation to adopt proposed Findings of Fact. Accordingly, Exception No. 27 is denied.

[*76] Having addressed all the issues raised by taxpayer and the corresponding exceptions, we now address the remaining exceptions.

In Exception No. 1, taxpayer maintains that the Court erred in finding that the assessment was made against William Fiore, t/a Fiore Trucking and Contracting Company, when the assessment also erroneously included other entities of taxpayer, Mill Industrial Service Company, Bill's Trucking, Inc., and Rolling Hills Village. He asserts that receipts from U.S. Steel Corporation clearly showed that more than one entity was audited.

We remind taxpayer that pursuant to Section 236 of the Code, 72 P.S. @ 7236, taxpayer bears the burden of proving that the assessments were improper. Taxpayers' bare allegation, without supporting evidence, is not sufficient to show that the audits were improper. Bruce & Merrilees Electric Company v. Commonwealth, 109 Pa.Commonwealth Ct. 101, 530 A.2d 994 (1987). [**20] Taxpayer's records admitted into evidence before the Court clearly provide support for the Court's finding of fact No. 17 that essentially taxpayer failed to keep separate records for its various business enterprises. Fiore himself testified that trucks used to perform work for U.S. Steel were owned by him individually but were used "in all facets of the operations of all of the companies." Notes of Testimony (N.T.), February 4, 1991, at 73-74. Later, when asked whether he could "identify by the number of the truck which entity

the truck worked for," Fiore answered: "These numbered trucks worked for all entities at different times . . . . THE COURT: [A]re you saying, then, you cannot identify specifically what truck was working for the [Fiore Trucking and Contracting] company? [FIORE]: No." N.T., February 5, 1991, at 218-19. Taxpayer, clearly having failed to meet its burden of providing adequate documentation, cannot now complain that the assessments contain elements of those other enterprises, and Exception No. 1 must be denied.

Similarly, in Exception No. 3, according to taxpayer the Court erred in finding that the Department conducted a [*77] "field" audit to examine [**21] taxpayer's records for the period January 1, 1975 through September 30, 1978 because there was testimony that the auditor did not know where taxpayer's place of business was located and that the auditor based his assessment solely upon a

comparison of income tax records and public utility reports and not an actual audit of taxpayer's records. In addition to taxpayer's failure to cite to specific testimony, these allegations are unsupported by the record.

Again, we must stress that the burden is on the taxpayer to rovide adequate records and supporting documentation. Section 271(a) of the Code provides that [e]very person liable for any tax imposed by this article, or for the collection thereof, shall keep the records, render such statements, make the returns and comply with such rules and regulations as the department may, from time to time, prescribe regarding matters pertinent to his business. Whenever in the judgment of the department it is necessary, it may require any person, by notice served upon such person, or by regulations, to make such returns, render such statements or keep such records as the department deems sufficient to show whether or not such

person is liable [**22] to pay or collect tax under this article. 72 P.S. @ 7271(a). Further, the Department's regulations at 61 Pa.Code @ 34.2(a)(1) provide that [e]very person who sells or uses personal property or services shall be required to keep the following basic records: (1) For purposes of accountability for use tax, taxpayers shall be required to retain all purchase invoices, requisitions, documents, and other records relating to their acquisition of tangible personal property and services. The purchaser shall maintain records showing that the tax was paid where the purchaser had paid the tax to his vendor, and where the purchaser has not paid tax to his vendor but has paid use tax directly to the Commonwealth. Where the purchaser has not paid tax in the above cited instances, he shall create and maintain records showing the reason he considered the purchase as nontaxable, and information [*78] concerning the nature, use, price and dates of purchases and use of the property, from which it can be

ascertained by the Department, with reasonable facility, whether or not use tax is due thereon and, if due, the amount of tax. To the extent that taxpayer maintained adequate records and to [**23] the extent that those records were made available to the auditors, those records were utilized by the auditors in reaching a decision regarding the assessments. Accordingly, Exceptions Nos. 3, 8, 10, 18 and 19 are denied.

Taxpayer argues in Exception No. 4 that the Court erred in its finding of fact No. 10 because that audit erroneously included mobile homes that taxpayer claims were not a part of Fiore Trucking and Contracting. Similarly, in Exception No. 6, taxpayer asserts that the Court erred in its finding of fact No. 13 because Fiore Trucking and Contracting was not involved in the purchase of mobile homes, in airplanes, and certain other property. Again, because of taxpayer's inadequate record keeping, these are

bare assertions with no supporting evidence. Therefore, Exceptions Nos. 4 and 6 are denied. Exception No. 5, that the Court erred in Finding of fact No. 11 because there was "no second examination of Taxpayer's records" to support the additional assessment at 1029 C.D.1985 is simply not supported by the record and, therefore, must be denied. In addition, Exception Nos. 9, 15 and 17 must be denied inasmuch as it was clearly established that taxpayer held no PUC [**24] certificate at any time relevant to these proceedings. Exception No. 16 is denied as this Court is unable to ascertain which Finding of fact taxpayer is referring to. Lastly, Exception No. 12, that the Court erred in stating that "the Commonwealth has no duty to prove the validity of the tax assessment," must be denied. The courts have consistently held that the burden is on the taxpayer to prove that taxes were improperly assessed and that the Commonwealth is not required to prove facts necessary to sustain those assessments. Commonwealth v.

Beck Electric Construction, Inc., 32 Pa.Commonwealth Ct. 229, 379 A.2d 626 (1977), aff'd in part, rev'd in part on other grounds, 485 Pa. 604, 403 A.2d 553 (1979); Anastasi Brothers Corp. v. Commonwealth, [*79] 455 Pa. 127, 315 A.2d 267 (1974); Bruce & Merrilees Electric Company.

Accordingly, the Court's order of August 7, 1991, affirming the order of the Board of Finance and Revenue is affirmed, and judgment shall be entered in favor of the Commonwealth as set forth in that order.

ORDER

AND NOW, [**25] this 12th day of May, 1992, Petitioner's Exception No. 2 is granted, Petitioner's remaining Exceptions Nos. 1 and 3-30 are denied, and the Court's prior order of August 7, 1991 is affirmed. The

Chief Clerk is directed to enter judgment against Petitioner William Fiore, t/a Fiore Trucking and Contracting Co., and in favor of the Commonwealth of Pennsylvania, in the following amounts:

925 C.D. 1980

Use Tax -- $ 216,741.26 plus appropriate interest.

895 C.D. 1985

Use Tax -- $ 770,495.79 plus appropriate interest and penalties.

1029 C.D. 1985

Fuel Use Tax -- $ 81,728.57 plus appropriate interest and penalties.

WILLIAM M. FIORE, t/d/b/a

FIORE TRUCKING AND

CONTRACTING COMPANY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

BOARD OF FINANCE AND REVENUE,

Appellee

Nos. 50, 51 and 52 M.D. Appeal Docket 1992

SUPREME COURT OF PENNSYLVANIA

534 Pa. 511; 633 A.2d 1111;

1993 Pa. LEXIS 295

April 7, 1993, ARGUED

November 5, 1993, DECIDED

SUBSEQUENT HISTORY: Application for Reargument Denied December 9, 1993, Reported at: 1993 Pa. LEXIS 295.

PRIOR HISTORY: [**1]

Appeal from the Order entered May 12, 1992 in the Commonwealth Court at Nos. 925 C.D. 1980; 895 C.D. 1985; and 1029 C.D. 1985, affirming the Commonwealth Court's Order of August 7, 1991 and the Orders of the

Board of Finance and Revenue, RST-3470; RST-8153; and RST-8499. 148 Pa.Cmwlth. 62, 609 A.2d 862 (1992)

DISPOSITION: Vacated and Remanded.

JUDGES: FLAHERTY, Cappy, Papadakos

OPINIONBY: FLAHERTY

OPINION: [*1112] OPINION OF THE COURT

MR. JUSTICE FLAHERTY

This is an appeal by the taxpayer, William Fiore, t/d/b/a Fiore Trucking and Contracting Company (Fiore), from tax assessments for the years 1976 through 1981 entered by the Commonwealth Board of Finance and Revenue and affirmed by the Commonwealth Court. Fiore raises several

challenges to the sales and use tax assessments amounting to more than $ 1,000,000 plus interest and penalties, attacking both procedural and substantive determinations made in these proceedings. Our exhaustive review of this voluminous record discloses that the tax assessments were, on this record, improperly determined, and we therefore vacate the order of the Commonwealth Court. [**2]

The facts underlying this controversy may be summarized as follows. The taxpayer, Fiore, is a proprietorship licensed by the Department of Revenue for sales and use tax collection and remittance. Fiore purchased liquid fuel, depreciable equipment, parts, tires, repairs, mobile homes, an airplane and other property, and also leased certain trucks, all of which provide the basis for sales and use tax assessments.

William Fiore also owned and operated other

proprietorships operated under various trade names including Mill Industrial Service Company, Diamond Fuel, Diamond Excavating and Hauling, and Rolling Hills Village; William Fiore also was the sole shareholder and operator of Bill's Trucking, Inc. These various entities had overlapping business activities and records, and the intermingling of their business activities appears to be responsible in large part for the difficulties in auditing the taxpayer and assessing the taxes owed by Fiore Trucking and Contracting Company.

The taxpayer was audited by the Department of Revenue for the period January 1, 1975, through September 30, 1978, resulting in an assessment for a deficiency of $ 216,741.26 plus interest of $ 35,038.99 and a penalty [**3] of $52,609.86, or a total of $ 304,390.11. Fiore's appeal to the Board of Finance and [*1113] Revenue resulted in abatement of the penalty but

affirmance of the deficiency and interest. The deficiency of $ 251,780.25 was appealed to the Commonwealth Court at docket number 925 C.D. 1980.

During the pendency of the appeal of the first assessment, the department again audited Fiore, this time examining the period October, 1978 through December, 1981. The department assessed a deficiency of $ 831,207.28 plus interest of $ 226,626.01 and a penalty of $ 207,801.87, or a total of $1,265,635.16. The appellate boards of the department reduced the assessment to $770,495.79 plus appropriate interest and penalties. This second deficiency assessment was appealed to the Commonwealth Court at docket number 895 C.D. 1985.

The second audit resulted in an additional assessment for a fuel use tax deficiency in the amount of $ 81,728.57 plus interest of $ 24,963.68 and a penalty of $ 8,172.86, or a total of $114,865.62. This was affirmed in all respects by

the Board of Finance and Revenue, and was appealed to the Commonwealth Court at docket number 1029 C.D. 1985. [**4]

The three appeals were consolidated in the Commonwealth Court, which affirmed the three contested orders of the Board of Finance and Revenue. Fiore v. Commonwealth, 141 Pa.Cmwlth. 578, 596 A.2d 1147 (1991), aff'd on exceptions Fiore v. Commonwealth, 148 Pa.Cmwlth. 62, 609 A.2d 862 (1992) (en banc).

Appellant raises a variety of issues, procedural, constitutional, and evidentiary, of which we find only one to have merit. Fiore claims that he was denied procedural due process when the Commonwealth was permitted to change its basis for the tax assessments at the eleventh hour, but Fiore was not given equal procedural flexibility. The taxing authority's original position was that the taxpayer was not entitled to a public utility exclusion because he

predominantly served one customer. It maintained this position throughout the first ten years of this proceeding, and prevailed before the Board of Appeals of the Department of Revenue and again before the Board of Finance and Revenue. At a later stage of the proceedings, during the appeal to the Commonwealth Court, it was determined that such a rule [**5] was erroneous, so the Commonwealth

argued instead that Fiore should be denied the exclusion because of his poor record keeping and because he was not certified as a common carrier. During the ten years following the first audit, there had never been any contention that

Fiore was not a common carrier, was guilty of poor record keeping, or lacked a license or certification. When the Commonwealth Court determined that a common carrier may haul predominantly for one customer, the Commonwealth was permitted to adopt the latter arguments

-- after discovery had ended and a mere twenty days before the evidentiary hearing in the Commonwealth Court.

Fiore argues that the proceedings constituted a denial of procedural due process. We agree. The taxing authority long labored under an erroneous conception that a common carrier could not properly serve predominantly one customer. It was successful in advocating this erroneous legal standard before

the revenue boards and Fiore was compelled, throughout the proceedings, to counter this now conceded misapplication of the law. Fiore finally prevailed before the Commonwealth Court, only to be met by a barrage of new legal theories

which would subject [**6] him to liability for the assessments. Fiore's de novo hearing before the Commonwealth Court, he claims, was held before he had time to prepare to address the new legal theories advanced by the Commonwealth.

The Commonwealth argues in response that Fiore had a full and fair opportunity to establish entitlement to exemption, citing the comprehensive proceedings and appeals before the Board of Appeals of the Department of Revenue

and the Board of Finance and Revenue. Only after the taxpayer appealed to the Commonwealth Court, however, did the Commonwealth appear as an adversarial interested party. The Commonwealth relied for its prima facie case upon the

findings and exhibits contained in the "Field Audit Report and Basis for Assessment." In the hearing held before the Commonwealth Court, the court properly limited the presentation of evidence to the assessed transactions which were litigated in the finance boards below. [*1114] The Commonwealth claims that the taxpayer received a full and fair opportunity to prove "those facts necessary for relief on those issues properly raised and preserved." According

to the Commonwealth, Fiore failed to meet his burden of proof with regard to the application [**7] of the claimed public utility exclusion to the assessed items of equipment.

The Commonwealth's response misses the point of the taxpayer's argument. The thrust of Fiore's grievance is that limiting his proof in the Commonwealth Court hearing to "those facts necessary for relief on those issues properly raised and preserved" was unjust since the issues litigated before the Board of Appeals of the Department of Revenue and the Board of Finance and Revenue were different from those raised by the Commonwealth in the final hearing. We agree that this constitutes a denial of procedural due process.

This court has stated in another context that due process "requires at a minimum that the deprivation of life, liberty or property by adjudication must be preceded by notice and opportunity for hearing appropriate to the nature of the case." In re Upset Sale, Tax Claim Bureau of Berks

County, 505 Pa. 327, 333, 479 A.2d 940, 943 (1984) (emphasis added). Although this case does not deal with lack of actual notice or the total absence of a hearing, we note that due process requires an appropriate hearing. In Conestoga National Bank v. Patterson, 442 Pa. 289, 275 A.2d 6 (1971), [**8] this court analyzed the minimum requirements of due process, a difficult undertaking. We stated:

There is no general definition of procedural due process applicable to every situation, and courts have deliberately refrained from formulating one. As one court has noted: "Procedural Due Process, as this court understands it, is not susceptible of advance definition. In the administrative field the desiderata are notice and opportunity to be heard . . ." . . . . "'Due process of law', while incapable of exact definition, generally means 'law in the regular course of administration through courts of justice, according to those rules and forms which have been established for the

protection of human rights.' Its essential elements are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause' . . . ." 442 Pa. at 294-95, 275 A.2d at 8-9 (citations omitted; emphasis added). Again we note that procedural due process requires more than notice and hearing, but protects as well the right to an orderly proceeding adapted to the nature of [**9] the case. The opportunity to be heard means little unless it occurs in

an orderly, regular proceeding appropriate to the nature of the case. It is the orderliness and appropriateness of the hearing before the Commonwealth Court that are in question here, and we deem the procedural due process rights of

Fiore to have been infringed.

Fiore is in no way relieved of his duty to comply with all statutory and regulatory strictures incumbent upon

commercial taxpayers, upon common carriers or public utilities, or upon taxpayers claiming exemptions. For example, section 271(a) of the Tax Reform Code of 1971 provides:

Every person liable for any tax imposed by this article, or for the collection therof, shall keep the records, render such statements, make the returns and comply with such rules and regulations as the department may, from time to time, prescribe regarding matters pertinent to his business . . . .

72 P.S. @ 7271(a). The department's regulations further provide:

Every person who sells or uses personal property or services shall be required to keep the following basic records:

(1) For purposes of accountability for use tax, taxpayers

shall be required to retain all purchase [**10] invoices, requisitions, documents, and other records relating to their acquisition of tangible personal property and services. The purchaser shall maintain records showing that the tax was paid where the purchaser had paid the tax to his vendor, and where the purchaser has not paid tax to his vendor but has paid use tax directly to the Commonwealth. Where [*1115] the purchaser has not paid tax in the above cited instances,

he shall create and maintain records showing the reason he considered the purchase as nontaxable, and information concerning the nature, use, price and dates of purchases and use of the property, from which it can be ascertained by the Department, with reasonable facility, whether or not use tax is due thereon and, if due, the amount of tax. 61 Pa.Code @ 34.2(a)(1). Fiore is fully subject to these requirements.

Nevertheless, he was haled into court to account for six

years of sales and use tax records, and was given only twenty days notice to justify his exemption despite ten prior years of litigation in which the salient issue was whether his business predominantly served one customer. Due process requires that notice of hearing be reasonable in terms of opportunity [**11] to prepare to answer the issues raised by the Commonwealth for the first time at a late stage of the litigation.

Accordingly, on the facts of this case, we must vacate the order of tax deficiency and remand the case to the Commonwealth Court for a new hearing at which Fiore will be given the opportunity to prove his entitlement to exemption from the sales and use tax, after receiving sufficient notice to search his records and prepare documentation of his claimed entitlement.

Order vacated and case remanded for further

proceedings in accordance with this opinion.

Mr. Justice Larsen did not participate in the consideration or decision of this case.

Mr. Justice Cappy concurs in the result.

Mr. Justice Papadakos files a dissenting opinion.

DISSENTBY: PAPADAKOS

DISSENT: DISSENTING OPINION

MR. JUSTICE PAPADAKOS

I dissent and would affirm on the basis of the Commonwealth Court well reasoned opinion and order.

WILLIAM FIORE, t/a FIORE

TRUCKING AND CONTRACTING,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

No. 925 C.D. 1980,

No. 895 C.D. 1985,

No. 1029 C.D. 1985

COMMONWEALTH COURT OF PENNSYLVANIA

90

668 A.2d 1210; 1995 Pa. Commw. LEXIS 562

November 16, 1995, ARGUED

December 15, 1995, Decided

December 15, 1995, FILED

PRIOR HISTORY: [**1] APPEALED From Orders dated August 7, 1991. State Agency Board of Finance and Revenue. APPEALED From No. Orders dated August 7, 1991.

COUNSEL: William Fiore for petitioner.

Clinton G. Smith, Jr., Deputy Attorney General, for

respondent.

JUDGES: BEFORE: HONORABLE JOSEPH T. DOYLE, Judge, HONORABLE SANDRA SCHULTZ NEWMAN, Judge, HONORABLE EMIL E. NARICK, Senior Judge.

Judge Pellegrini did not participate in the decision in this case.

OPINIONBY: EMIL E. NARICK

OPINION:

[*1211] OPINION BY

SENIOR JUDGE NARICK

FILED: December 15, 1995

This case is before us on remand from the Supreme Court

of Pennsylvania which vacated this Court's order of tax deficiency and ordered [**2] a new hearing before this Court. The basis for this order was that William Fiore, t/d/b/a Fiore Trucking and Contracting [*1212] (Taxpayer) had been denied procedural due process when this Court permitted the Commonwealth of Pennsylvania (Commonwealth) to assert new legal theories regarding Taxpayer's liability for the tax assessments just weeks before the hearing before this Court (Hearing I), thus forcing the Taxpayer to justify his exemption and counter these new

arguments on only twenty days notice.

During the ten years following the first audit, the taxing authority had successfully asserted the legal standard that a common carrier could not properly serve one customer. At a later stage of the proceedings, during the appeal to the Commonwealth Court, it was determined that such a standard was erroneous, and thus, subsequently, the

Commonwealth argued successfully at Hearing I that Taxpayer should be denied his exemption because of his poor record keeping and because Taxpayer was not a common carrier or lacked a license or certification. Consequently, the Supreme Court held that Taxpayer was denied his due process rights when he was denied a meaningful opportunity "to prove his entitlement [**3] to exemption from the sales and use tax, after receiving sufficient notice to search his records and prepare documentation of his claimed entitlement." Fiore v. Commonwealth Board of Finance and Revenue, 534 Pa. 511,

The facts underlying this controversy prior to remand were summarized by the Supreme Court as follows:

The taxpayer, Fiore [Trucking and Contracting], is a proprietorship licensed by the Department of Revenue for sales and use tax collection and remittance. Fiore purchased liquid fuel, depreciable equipment, parts, tires,

repairs,

mobile homes, an airplane and other property, and also leased certain trucks, all of which provide the basis for sales and use tax assessments.

William Fiore also owned and operated other proprietorships operated under various trade names including Mill Industrial Service Company, Diamond Fuel,

Diamond Excavating and Hauling, and Rolling Hills Village; William Fiore also was the sole shareholder and operator of Bill's Trucking, Inc. These various entities had overlapping business activities and records, and the intermingling of their business activities appears to be responsible in large part [**4] for the difficulties in auditing the taxpayer and assessing the taxes owed by Fiore Trucking and Contracting Company. The taxpayer was audited by the Department of Revenue for the period January 1, 1975, through September 30, 1978, resulting in

an assessment for a deficiency of $ 216,741.26 plus interest of $ 35,038.99 and a penalty of $52,609.86, or a total of $ 304,390.11. Fiore's appeal to the Board of Finance and Revenue resulted in abatement of the penalty but affirmance of the deficiency and interest. The deficiency of $251,780.25 was appealed to the Commonwealth Court at docket number 925 C.D. 1980.

During the pendency of the appeal of the first assessment, the department again audited Fiore, this time examining the period October, 1978 through December, 1981. The department assessed a deficiency of $ 831,207.28 plus interest of $ 226,626.01 and a penalty of $ 207,801.87, or a total of $1,265,635.16. The appellate boards of the department reduced the assessment to $770,495.79 plus appropriate interest and penalties. This second deficiency assessment was appealed to the Commonwealth Court at docket number 895 C.D. 1985.

The second audit resulted [**5] in an additional assessment for a fuel use tax deficiency in the amount of $81,728.57 plus interest of $ 24,963.68 and a penalty of $ 8,172.86, or a total of $114,865.62. This was affirmed in all respects by the Board of Finance and Revenue, and was appealed to the Commonwealth Court at docket number 1029 C.D. 1985.

The three appeals were consolidated in the Commonwealth Court, which affirmed the three contested orders of the Board of Finance and Revenue. Fiore v. Commonwealth, 141 Pa. Commw. 578, 596 A.2d 1147 (Pa. Cmwlth. 1991), aff'd on exceptions, Fiore v. Commonwealth, [*1213] 148 Pa. Commw. 62, 609 A.2d 862 (Pa. Cmwlth. 1992) (en banc). Id. at 514, 633 A.2d at 1112-13.

Pursuant to the remand order, this Court scheduled a status conference for January 24, 1994, later rescheduled for February 15, 1994, which resulted in an order, filed

March 9, 1994: (1) to schedule an evidentiary hearing after

Taxpayer was given sufficient time to search his records and prepare documentation for presentation at the hearing; (2) to include the entire record, consisting of the prior testimony and depositions and exhibits offered and entered into evidence in this Court's prior hearing involving this case, as

[**6] part of the record in the evidentiary hearing which was to be scheduled in the future; and (3) to schedule a second status conference for April 14, 1994, prior to which the parties were to prepare a statement advising this Court of the issues and legal theories they each wished to pursue in the evidentiary hearing.

After the parties filed the required statement, they agreed that they were ready for another status conference, which took place on August 9, 1994. As a result of this status conference, the parties submitted their pre-hearing

statements and a list of the witnesses who would be called and the exhibits which would be offered. The parties agreed they were ready for a second hearing (Hearing II), which was scheduled for November 14, 1994. Immediately before this hearing, Taxpayer's attorney, Henry G. Beamer, was granted leave to withdraw as counsel on his motion stating that he had been discharged by Mr. Fiore who wished to proceed pro se.

At the end of Hearing II, after Taxpayer had closed and rested his case and the Commonwealth had presented no witnesses and rested its case, this Court permitted both Taxpayer and the Commonwealth to review and make an inventory of [**7] the boxes of documents marked for identification as Taxpayer's exhibits 7 through 14, in order to find leases which allegedly would show that Taxpayer leased his trucks and equipment to tax-exempt entities. Subsequent to this review, the Commonwealth presented objections to the admission of these exhibits, and argument

was held on February 28, 1995 on the admissibility of these douments. We make the following findings of fact on the basis of Hearing II.

1. Although Attorney Beamer had been allegedly discharged by Mr. Fiore and was granted leave to withdraw as his counsel, Attorney Beamer was present throughout the three days of hearings, where he sat with Mr. Fiore at counsel table until ordered not to do so, and intermittently handed documents to Mr. Fiore for use at the hearing, and regularly consulted with him throughout the proceedings.

2. The Public Utility Commission (PUC) certificates licensing both Bill's Trucking, Inc. (Bill's Trucking) and William M. Fiore t/a Mill Industrial Service Co. (Mill Industrial) as motor vehicle common carriers were submitted. These documents had been admitted into evidence in Hearing I and were made part of the record in Hearing II by virtue [**8] of this Court's order of

March 9, 1994.

3. Mr. Bernard Kachmar, auditor for the Department of Revenue was called to testify by Taxpayer. He testified about his audit of Taxpayer for the period 10/1/78 to 12/31/81, and his narrative report of that audit which had previously

been admitted into evidence.

4. Mr. Kachmar stated that he audited only Fiore Trucking and Contracting, and did not audit Bill's Trucking, nor did he audit Mill Industrial. He testified that the equipment owned by Taxpayer, and on which tax was assessed, was listed on Taxpayer's depreciation schedule. Taxpayer did not produce any evidence to show that the property depreciated was not owned by Fiore Trucking and Contracting, nor that the Commonwealth improperly assessed sales or use tax on the basis of this schedule. Although no sales or use tax had been paid by Taxpayer on this equipment during the relevant period, no evidence was

introduced to show that Mr. Kachmar failed to take into account documentation, which would have been available to him, and which would have shown that the property was actually used in exempt public utility activity.

5. Taxpayer did not produce any evidence to show that Mr. Kachmar's [**9] audit was incomplete.

[*1214]

6. Taxpayer submitted 47 leases, marked as Petitioner's exhibit No. 3, to show that the trucks owned by Fiore Trucking and Contracting were leased to his other tax exempt entities. These leases proved to post-date all relevant

time periods, that is they were leases dated 1984 or 1985, while the audits were for periods from 1975 to 1981.

7. Taxpayer presented evidence that in October, 1979 it applied for contract carrier authority from the PUC. (Petitioner's Exhibits Nos. 4 and 5.) In this application, verified by sworn affidavit, Taxpayer states that Fiore

Trucking and Contracting did not hold any certificates of public convenience or permits for common carrier authority. Contract carrier authority was not granted on the basis of this application due to insufficient documentation.

8. Taxpayer did not present any evidence showing that it held a certificate of public convenience for common carrier authority from the PUC for Fiore Trucking and Contracting.

9. Mr. Stan Noszka, who performed the field audit of Taxpayer for the period January 1, 1975, through September 30, 1978, was called by Taxpayer and testified that he had no independent recollection [**10] of the audit, apart from what was written in his December 1978 narrative report and attached exhibits.

10. Mr. Alex Possino, Taxpayer's accountant for the audit years, was called by Taxpayer and testified regarding Taxpayer's bookkeeping practices. He stated that all the money generated by Mill Industrial, another entity owned

by Mr. Fiore, was deposited in the bank accounts set up in the name of Fiore Trucking and Contracting, and that some of the money generated by Bill's Trucking, a corporation owned solely by Mr. Fiore, was deposited in Fiore Trucking and

Contracting accounts. Mr. Possino stated that Fiore Trucking and Contracting did all the billing for Mill Industrial and Bill's Trucking, and that the receipts journal did not indicate which Fiore entity performed the services for which the money was paid. He admitted that he had no personal knowledge of how the items assessed for sales or use tax deficiencies were used.

11. Mr. Possino stated that no equipment or trucks were owned by Mill Industrial or Bill's Trucking, except for some trucks owned by Bill's Trucking at the time Mr. Fiore acquired the corporation and which were fully depreciated. He also stated that the trucks [**11] used by Bill's Trucking were rented or leased from Fiore

Trucking and Contracting, but that he had never seen these leases. He also stated that he had no personal knowledge whether the trucks owned by Fiore Trucking and Contracting were engaged in PUC activities.

12. Mr. Martin Smith, a taxation auditing manager with the Pennsylvania Department of Revenue, Bureau of Audits, testified regarding his October 7, 1990 report on the documents submitted by Taxpayer for the audits of Fiore Trucking and Contracting conducted by the Commonwealth. He stated that he had reviewed this conglomeration of documents which related to a number of Mr. Fiore's

entities, not just to Fiore Trucking and Contracting. He stated, consistent with his report which was made part of the record in the November 26-27, 1990 hearings, that the thirty-four (34) boxes submitted by Taxpayer contained a mixture of sole proprietorship and corporation records, and undifferentiated bills of lading, weight slips, coke slips,

drivers' logs and dispatch books, etc., from the various entities which Mr. Fiore owned.

13. The November 14-16, 1995 hearing was continued and Taxpayer and the Commonwealth were ordered to inspect and [**12] inventory the boxes submitted into evidence as Petitioner's Exhibits 7-14. Taxpayer's inventory failed to correlate the contents of each box with a specific exhibit number, and it was therefore often impossible to ascertain whether Taxpayer's inventory corresponded to that of the Commonwealth. Moreover, Taxpayer inventoried the contents after the Commonwealth had finished its review, and noted that, "the files belonging to Mr. Beamer that were incorrectly included" have been removed." Taxpayer did not specify which files were removed.

14. Neither party lists in its inventory of exhibits 7-14, any leases which, as Taxpayer alleged, would show that Taxpayer leased its equipment to other Fiore entities which

held [*1215] PUC certificates during the relevant audit years.

15. Petitioner's Exhibits 7-14, are boxes and one folder which contain miscellaneous documents, including purchase orders, bills of lading, time logs, invoices, etc. For example, Exhibit 9 contains 1982 cash receipts and a receiving and shipping journal for Municipal Industrial Disposal Co.; "Bill
Fiore Trucking's" time slips; Mill Industrial's clock vouchers from U.S. Steel Corp.; miscellaneous diesel fuel invoices from Exxon [**13] USA to Fiore Trucking and Contracting; 1984 Pennsylvania gross receipts tax settlement sheets; various bills, Internal Revenue Service forms (1099's), and Dillner Storage weight tickets. Thus, some documents post-date the audit period, and Fiore Trucking and Contracting documents are intermingled with those of other
entities. None of the documents show which entity

operated the assessed equipment, nor what constituted the predominant use of the assessed equipment.

16. Mr. Fiore affirmed that he was satisfied that he was given an opportunity to show that the equipment assessed was used in common carrier activities.

In keeping with the Supreme Court's opinion, Taxpayer was given notice by this Court that he must search his records and prepare documentation for his second hearing on his claimed entitlement to a public utility exclusion for assessed items of equipment. In order to prove this entitlement, and overcome the Commonwealth's theories of liability, Taxpayer was required to prove that Fiore Trucking and Contracting: (1) held authority as a common carrier; (2) had met its burden to prove that the assessed property was predominantly used directly in the rendition of public utility [**14] service, and (3)

complied with 72 P.S. @ 7271(a)[1] and 61 Pa. Code @ 34.2.(a)(1), regarding the maintaining of records from which it could be ascertained by the Commonwealth, with reasonable facility, whether or not use tax was due, and the amount that

was due.

It is well established that the burden is on the taxpayer challenging the assessment to show that the tax has been improperly assessed, while the Commonwealth is not required to prove facts necessary to sustain the assessment. J.L Turner Co. v. Commonwealth, 41 Pa. Commw. 146, 399 A.2d 433 (Pa. Cmwlth. 1979).

Section 7202(b) of the Tax Reform Code of 1971[2] (Tax Code) requires that a six percent use tax be levied on all

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[1]Section 271(a) of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended.

[2]Act of March 4, 1971, P.L. 6 as amended, 72 P.S. § 7202(b).

personal property purchased at retail. Subparagraphs (i) and (iii) of Section 5201(o)(4)(B) of the Tax Code,[3] exclude

from taxation the use of tangible personal property if it is used "directly" in the manufacture of personal property, or in the operation [**15] of a public utility in rendering the public utility service. Moreover, Section 5201(o)(4)(B) provides that the exclusions found in the above subsections do not apply to any vehicle required to be registered under the Vehicle Code[4] except those vehicles directly used by a public utility engaged in the business as a common carrier.

In addition, 61 Pa. Code @ 32.34(a)(2) provides that property: when predominantly used directly in rendering a public utility service, shall be exempt from tax. Where a single unit of property is put to use in two different activities, one of which is a direct use, and the other of

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[3] 72 P.S. § 7201(o)(4)(B)(iii).

[4] 75 Pa. C.S. §§101-9821

which is not, the property shall not be exempt from tax unless the public utility makes use of the property more than 50% of the time directly in public utility activities. Thus, in order for a taxpayer to prove his entitlement to an exemption from [**16] use tax, a taxpayer must establish that the entity using the assessed items of property has public utility authority, and that the assessed items of property were directly and predominantly used in the rendition of a public utility service, or in manufacturing. In the case of those vehicles required to be registered under the Vehicle Code, a taxpayer must prove he is entitled to exemption by [*1216] showing that the vehicles were directly used by a business with common carrier authority.

Mr. Fiore first argues that Fiore Trucking and Contracting, which was a sales and use tax licensed individual proprietorship, was a PUC licensed common carrier. Mr. Fiore claims that because he individually, was

issued P.U.C. authority in 1953, and held this PUC certificate for forty-two (42) years, the entity, Fiore Trucking and Contracting, is entitled to such exclusion from sales

and use tax. However, there is no evidence in the record of either Hearing I or Hearing II to support this claim. The record from Hearing I establishes that William Fiore, individually, held PUC authorized common carrier rights in his name until 1974. At that time, he made application to the PUC to transfer his rights from William [**17] Fiore generally, to the distinct proprietorship, "William Fiore t/a Mill Industrial Service Co." The transfer of the right to

provide motor carrier services must be approved by the PUC. 66 Pa. C.S. @ 1102(a)(3); 52 Pa. Code @ 27.6(a); South Hills Movers v. Pennsylvania Public Utility Commission, 144 Pa. Commw. 505, 601 A.2d 1308 (Pa. Cmwlth. 1992). Subsequently, the transfer was effected,

and Mill Industrial became the licensed common carrier.

Mr. Fiore also contends that he personally owned all the equipment, that is, the trucks and the trailers, and that he maintained and serviced all the equipment. He also claims that all the revenue earned by the two companies, Fiore Trucking and Contracting and Mill Industrial, was deposited in the account of Fiore Trucking and Contracting to pay for all costs of the equipment, including maintenance and service, and for payroll costs. He maintains, in

effect, that because he combined his businesses under one financial umbrella, for the purposes of deposits, payroll and expenditures, all of his solely owned proprietorships, including the audited entity, Fiore Trucking and Contracting, have common carrier authority and are entitled to tax exemption. Thus, he [**18] would have this Court conclude that despite the fact that Fiore Trucking and Contracting holds no PUC certificate, and is

therefore not subject

to any of the operational standards imposed on common carriers, this entity is nevertheless entitled to common carrier authority and exemption from use and sales tax. This conclusion is without merit.

A certificate of public convenience is a privilege granted by the PUC, allowing the entity holding the certificate, in whose name it is issued, to operate a public utility, such as a common carrier, subject to the limitations imposed by PUC statutes and regulations. Pennsylvania Public Utility Commission v. Zanella Transit, Inc., 53 Pa. Commw. 359, 417 A.2d 860 (Pa. Cmwlth. 1980). Public utilities, including common carriers, are highly regulated by the PUC, and many aspects of the services offered by the entity certified come under close scrutiny by the PUC. Among other matters, the PUC approves and reviews the rates charged by the carrier, 66 Pa. C.S. @@ 1301-1302, the frequency and location of the service, 66 Pa. C.S. @@

2301-2304, the safety and convenience of the facilities, and the fairness in the delivery of these services. 66 Pa. C.S. @@ 1501-1509. Thus, [**19] each entity or business holding a certificate of public convenience must comply with the conditions and restrictions imposed by statute and regulation and must file an annual report with the PUC. 52 Pa. Code @ 27.10(a); Fusaro v. Pennsylvania Public Utility Commission,, 34 Pa. Commw. 14, 382 A.2d 794 (Pa. Cmwlth. 1978).

Therefore, if this Court were to accept Mr. Fiore's proposition that because he combines all his entities for billing and bookkeeping purposes under one of his named entities, Fiore Trucking and Contracting, this entity is entitled to tax exemption as a licensed public utility, we would undermine the entire regulatory framework of the PUC by permitting, and in fact condoning, the practice in which an entity would be allowed to provide services to the public without the requisite regulation and oversight of

the PUC. McQuaide v. Pennsylvania Public Utility Commission, 157 Pa. Commw. 249, 629 A.2d 272 (Pa. Cmwlth. 1993). This would also clearly circumvent the Public Utility Code's requirement that all carriers which provide service to the public hold a certificate of public convenience.

[*1217] Moreover, the evidence does not support Mr. Fiore's contentions regarding the common ownership of all the equipment [**20] used in his carrier businesses. In this regard, the auditor, Mr. Kachmar, testified that the individual items of equipment, such as trucks, listed as operating equipment in a given year on the PUC annual reports filed by Mill Industrial, the proprietorship holding the PUC common carrier certificate, are not listed on any Fiore Trucking and Contracting income tax depreciation schedules.

The record also reflects that Mr. Fiore made application for "contract carrier" status to the PUC for Fiore Trucking

and Contracting on March 10, 1980, which was never granted because of a failure to provide supplemental documentation. In this 1980 application, Mr. Fiore represented in a verified statement, that Fiore Trucking and Contracting presently held neither contract nor common carrier authority from the PUC. Thus, Mr. Fiore admitted that Fiore Trucking and Contracting was not a common carrier prior to 1980. In conclusion, we hold that Taxpayer failed to carry its burden to prove that Fiore Trucking and Contracting held a certificate of public convenience from the PUC as a common carrier in the relevant taxable years.

Mr. Fiore also failed to prove that the assessed equipment owned by Fiore [**21] Trucking and Contracting, or the fuel used by these trucks, was predominantly used in the direct rendition of public utility services. Mr. Fiore

was required to show by record evidence that the assessed

equipment was directly and predominantly used by a PUC common carrier entity, such as Bill's Trucking or Mill Industrial, in the rendition of a public utility service. Instead, Mr. Fiore offered into evidence boxes of undifferentiated documents from which it was impossible to ascertain the use of any assessed item of equipment. Although he had been given a year to prepare these documents, Mr. Fiore did not even know, prior to their inventory, what documents these boxes contained, nor did he know what these document were meant to establish.

Mr. Fiore insisted that Fiore Trucking and Contracting leased its equipment to other PUC entities for use in public utility service, and that such leases would be found in his boxes of documents. However, Mr. Fiore was unable to identify which boxes, among the many piled in the back of the courtroom, contained these leases. After this Court allowed Mr. Fiore time to select several boxes as possible sites for these leases and marked these boxes for [**22]

identification, no leases were identified in the subsequent inventory. Moreover, the annual PUC reports did not reflect that equipment was leased to Mill Industrial from Fiore Trucking and Contracting, or from any other sources,

while the leases marked for identification during Hearing II post-dated the relevant assessment period. Therefore, Taxpayer failed to prove that the assessed equipment was leased to a PUC licensed entity. See 52 Pa. Code @ 31.32(c)(2)(k).

This Court gave Mr. Fiore every opportunity to present evidence of the direct and predominant use of the assessed items of property, but although voluminous evidence was submitted, it is not possible to ascertain either the use of the

equipment or the entity predominantly using the equipment assessed for tax. Taxpayer's bare assertions that its equipment was used in manufacturing or in the delivering

of a public utility service will not sustain its burden of proving that the tax was improperly assessed. Bruce & Merrilees Electric Co. v. Commonwealth, 109 Pa. Commw. 101, 530 A.2d 994 (Pa. Cmwlth. 1987).

This failure of proof is in accord with our conclusion that Taxpayer's records are inadequate and not in compliance with statutory [**23] and regulatory record-keeping requirements. Although holding that Mr. Fiore was not

given enough notice and time prior to Hearing I to provide documentation supporting his assertion that he was entitled to his exemption, the Supreme Court nevertheless ratified this Court's insistence on record keeping compliance stating, "Fiore is in no way relieved of his duty to comply with all statutory and regulatory strictures incumbent upon commercial taxpayers, upon common carriers or public utilities, or upon taxpayers claiming exemptions." Fiore, 534 Pa. at 517, 633 A.2d at 1114.

[*1218] In particular, 61 Pa. Code @ 34.2(a)(1) requires that where the taxpayer has not paid use tax to either the vendor of the property or directly to the Commonwealth, the taxpayer must create and maintain records showing the reason he considered the purchase of such personal property as nontaxable, and information concerning the nature, use, price and dates of purchases and use of the property, from which it can be ascertained by the Department, with reasonable facility, whether or not use tax is due thereon and, if due, the amount of tax.

The records maintained by Mr. Fiore are inadequate to show why no use or [**24] sales tax was paid. For instance, the numerous bills of lading and driver time sheets are not connected by other documents or testimony with any specific piece of Taxpayer's assessed equipment.

Therefore, they do not constitute any proof of the actual use made of the assessed equipment, and are inadequate to show compliance with the record keeping requirements mandated by statute and regulations for all public utilities.

CONCLUSIONS OF LAW

1. Taxpayer, Fiore Trucking and Contracting Co., did not hold a PUC certificate of public convenience as a common carrier.

2. Taxpayer did not meet its burden to prove that the assessed property was predominantly used directly in the rendition of public utility service.

3. Taxpayer's records are inadequate and not in compliance with the statutory and regulatory record keeping requirements found in 72 P.S. @ 7271(a) and 61 Pa.

Code @ 34.2(a)(1).

4. The use tax deficiency assessed at 925 C.D. 1980, as modified by the Board, for the period of January 1, 1975

through September 30, 1978, was proper.

5. The use tax deficiency assessed at 895 C.D. 1985, as modified by the Board, for the period October, 1978 through December, 1981, was proper.

6. [**25] The fuel use tax deficiency, assessed at 1029 C.D. 1985, for the period October, 1978 through December, 1981, was proper.

EMIL E. NARICK, Senior Judge

Judge Pellegrini did not participate in the decision in this case.

ORDER

AND NOW, this 15th day of December, 1995, the orders of the Board of Finance and Review in the above-captioned matters are hereby affirmed.

It is further Ordered that unless exceptions are filed within thirty (30) days from the date of this order, the

Prothonotary shall enter judgment in the favor of the Commonwealth of Pennsylvania in the following amounts:

925 C.D. 1980

Use Tax - $ 216,741.26 plus appropriate interest

895 C.D. 1985

Use Tax - $ 770,495.79 plus appropriate interest and penalties

1029 C.D. 1985

Fuel Use Tax - $ 81,728.57 plus appropriate interest and penalties.

EMIL E. NARICK, Senior Judge

WILLIAM FIORE, t/a FIORE

TRUCKING AND CONTRACTING,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

No. 925 C.D. 1980

COMMONWEALTH COURT OF PENNSYLVANIA

676 A.2d 723; 1996 Pa. Commw. LEXIS 164

March 13, 1996, Submitted on Briefs

April 22, 1996, Decided

April 22, 1996, FILED

PRIOR HISTORY: [**1] State Agency Board of Finance and Revenue.

COUNSEL: William Fiore, Pro Se, as Petitioner.

Clinton G. Smith, Jr., Deputy Attorney General, for Respondent.

JUDGES: BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge, HONORABLE JOSEPH T. DOYLE, Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE DAN PELLEGRINI, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Judge, HONORABLE JAMES R. KELLEY, Judge, HONORABLE JIM FLAHERTY, Judge. Judge Pellegrini did not participate in the decision in this case.

OPINION BY: JAMES GARDNER COLINS

OPINION:

[*724] OPINION BY PRESIDENT JUDGE COLINS

FILED: April 22, 1996

William M. Fiore, trading as Fiore Trucking and Contracting (Taxpayer), proceeding pro se, filed

exceptions and objections to the December 15, 1995 remand opinion and order of the Commonwealth Court of Pennsylvania. Fiore v. Commonwealth, 668 A.2d 1210 (Pa. Cmwlth. 1995) (Fiore II). In that remand opinion, this Court affirmed three orders of the Board of Finance and Revenue (Board) sustaining use tax deficiency assessments imposed by the Department of Revenue (Revenue) pursuant to Section 202(b) of the Tax Reform Code of 1971 (Code). [5]

[**2]

The facts underlying this controversy, as found by the Supreme Court of Pennsylvania and set forth in the remand opinion, follow:

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[5] Act of March 4, 1971, P.L. 6 as amended, 72 P.S. § 7202(b), which, in pertinent part, imposes a six percent tax on the retail purchase price of tangible personal property used in the Commonwealth.

The taxpayer, Fiore [Trucking and Contracting], is a proprietorship licensed by the Department of Revenue for sales and use tax collection and remittance. Fiore purchased liquid fuel, depreciable equipment, parts, tires, repairs, mobile homes, an airplane and other property, and also leased certain trucks, all of which provide the basis for sales and use tax assessments.

William Fiore also owned and operated other proprietorships operated under various trade names including Mill Industrial Service Company, Diamond Fuel, Diamond Excavating and Hauling, and Rolling Hills Village; William Fiore also was the sole shareholder and operator of Bill's Trucking, Inc. These various entities had overlapping business activities and records, and the intermingling of their business activities appears to be responsible in large part for the difficulties in auditing the taxpayer and assessing the taxes owed by Fiore Trucking

and Contracting Company.

The taxpayer was audited by the Department of Revenue for the period January 1, 1975, through September [**3] 30, 1978, resulting in an assessment for a deficiency of $ 216,741.26 plus interest of $ 35,038.99 and a penalty of $52,609.86, or a total of $304,390.11. Fiore's appeal to the Board of Finance and Revenue resulted in abatement of the penalty but affirmance of the deficiency and interest. The deficiency of $ 251,780.25 was appealed to the Commonwealth Court at docket number 925 C.D. 1980.

During the pendency of the appeal of the first assessment, the department again audited Fiore, this time examining the period [*725] October, 1978 through December, 1981. The department assessed a deficiency of $ 831,207.28

plus interest of $ 226,626.01 and a penalty of

$207,801.87, or a total of $1,265,635.16. The appellate boards of the department reduced the assessment to $779,495.79 plus appropriate interest and penalties. This second deficiency assessment was appealed to the Commonwealth Court at docket number 895 C.D. 1985.

The second audit resulted in an additional assessment for a fuel use tax deficiency in the amount to $ 81,728.57 plus interest of $24,963.68 and a penalty of $ 8,172.86, or a total of $114,865.62. This was affirmed in all respects by the Board of Finance [**4] and Revenue, and was appealed to the Commonwealth Court at docket number 1029 C.D. 1985.

The three appeals were consolidated in the Commonwealth Court, which affirmed the three contested orders of the Board of Finance and Revenue. Fiore v. Commonwealth, 141 Pa. Commw. 578, 596 A.2d 1147

(1991), aff'd on exceptions, Fiore v. Commonwealth, 148 Pa. Commw. 62, 609 A.2d 862 (1992) (en banc) [Fiore I].

668 A.2d at 1212-13 (quoting Fiore v. Board of Finance and Revenue, 534 Pa. 511,
514, 633 A.2d 1111, 1112-13 (1993)).

When we first considered this case in 1991, in Fiore I, we affirmed the assessments after concluding: 1) that Taxpayer was not entitled to the public utility or manufacturing exclusions from use and sales taxation as provided in
Section 201 of the Code, 72 P.S. @ 7201; [6] and 2) that

[6]Section 201(o)(4)(B) of the Code excludes from taxation any machinery, equipment, parts, and supplies used directly in the manufacture of personal property, 72.P.S. § 7201(o)(4)(B)(i), and machinery, equipment, parts, and supplies used directly in delivering a public

the auditors committed no impropriety in the method of preparing the audit report used by Revenue in assessing the deficiencies.

[**5]

During the course of the proceedings in Fiore I, this Court permitted the Commonwealth to change the legal basis for the tax assessments; this change of legal theories came after discovery ended and just twenty days before the evidentiary hearing. For the ten years following the first audit, the Commonwealth had successfully maintained that

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utility service, 72 P.S. § 7201 (o)(4)(B)(iii). The exclusion does not apply to vehicles "required to be registered under The Vehicle Code except vehicles directly used by a public utility engaged in the business as a common carrier...." Section 201(o)(4) of the Code, 72 P.S. § 7201(o)(4).

the Taxpayer was not entitled to the public utility exclusion because he predominantly served one customer. When this Court determined that a common carrier may serve just one customer, the Commonwealth was permitted to assert that the exclusion did not apply because the Taxpayer was not certified as a common carrier and his records did not

support his entitlement to an exclusion.

On appeal, the Supreme Court found merit in the Taxpayer's contention that he was deprived of procedural due process because he was not given a reasonable opportunity to prepare to answer the issues raised by the Commonwealth at the last minute. The court vacated and remanded to this Court for a new hearing at which the Taxpayer would be given the opportunity to prove his entitlement to exemption from the use tax, after having sufficient time to search his records [**6] and prepare

documentation.

Pursuant to the remand order, this Court held a second evidentiary hearing after giving the Taxpayer time to search his records and prepare documentation. To qualify for the exception, the Taxpayer was required to prove 1) that Fiore Trucking and Contracting held a certificate of authority as a common carrier or 2) that the assessed equipment was used predominantly and directly in public utility service, and 3) that Fiore Trucking and Contracting complied with statutory record-keeping requirements. At three days of hearings, the Taxpayer presented five witnesses and fourteen exhibits.

Based on the evidence presented at the second hearing, the Court in Fiore II affirmed the orders of deficiency assessment. The Court concluded that the Taxpayer did not

hold a certificate of public convenience as a common carrier and did not meet its burden of proving that the assessed property was used predominantly in the rendition of public utility service. The Court further concluded [*726] that the Taxpayer's records were inadequate and not in compliance with the record-keeping requirements set forth in Section 271(a) of the Code, 72 P.S. @ 7271(a), and at 61 Pa. Code [**7] @ 43.2(a)(1).

The Taxpayer filed timely exceptions to the Court's remand opinion and order, which exceptions are now before us. In substance, the Taxpayer's exceptions consist of objections to all of this Court's findings of fact and conclusions of law; some exceptions address matters beyond the scope of the remand order, matters the Supreme Court rejected as having no merit. We consider the relevant

exceptions within the scope of the three issues before the

Court on remand.

Several of the Taxpayer's exceptions generally object to the Court's conclusion (and related findings of fact) that Fiore Trucking and Contracting did not hold a Public Utility Commission (PUC) certificate of public convenience as a common carrier. The record indicates that the Taxpayer produced no evidence that Fiore Trucking and Contracting was licensed as a common carrier. The Taxpayer submitted PUC certificates for two other entities owned and operated by William Fiore (i.e., Bill's Trucking and William Fiore trading as Mill Industrial Services) and evidence that Fiore Trucking and Contracting applied for contract carrier authority in 1978 (not granted) and in 1991 (not within the audit period of 1975 through [**8] 1981).

The Taxpayer asserts that William Fiore, individually, held the common carrier license that applied to the entity,

William Fiore trading as Fiore Trucking and Contracting. (Exceptions Nos. 2 and 6.) To the contrary, the record shows that in 1974, with PUC approval, William Fiore transferred the common carrier rights to the entity, William Fiore trading as Mill Industrial Services. Furthermore, the term "common carrier," by definition, refers to any person or corporation (i.e., a single entity), 66 Pa. C.S. @ 1102, and not a group of related entities.

The Taxpayer objects to the Court's conclusion (and related findings) that the Taxpayer failed to prove that the assessed equipment was used directly and predominantly in providing public utility service. (Exceptions Nos. 5, 8-11.)

The Taxpayer testified that the assessed equipment was leased to Bill's Trucking and Mill Industrial Services, which used the equipment to provide public utility services. The Taxpayer failed to produce any leases or

other documentation to show how specific equipment was used or to otherwise link the equipment with other entities holding common carrier authority. At the second hearing, the Taxpayer [**9] submitted equipment leases for periods post-dating the audit period.

Exceptions Nos. 1, 3, 4, and 7 express the Taxpayer's objections to the Court's findings of fact with respect to the audits. The Court found that the auditors audited only Fiore Trucking and Contracting (and not Fiore, individually, or his related entities) and that the audits were complete and that the Taxpayer presented no evidence to the contrary. Our review of the record reveals nothing to sustain the Taxpayer's objections; furthermore, the integrity of the audits was not at issue on remand.

In Exception No. 12, the Taxpayer objects to the Court's finding that Fiore affirmed that he was given an

opportunity to show the assessed equipment was used in common carrier activities. The Taxpayer asserts that the Court gave him

only 15 minutes to go through the sixty boxes of records offered as Exhibits 7 through 14. Contrary to the Taxpayer's assertion, the record indicates that the Taxpayer brought only eight boxes of records to the hearing; that the Taxpayer had almost a full year after remand, from the first status conference in January 1994 to the hearing in November 1994, to search his records and prepare the [**10] documentation; and that the Court gave each party 30 days to inventory the boxes of records before hearing argument on their admissibility. Furthermore, even though the Taxpayer discharged his attorney before the November 1994 hearing, the attorney sat with the Taxpayer at the counsel table, advising and consulting with the Taxpayer throughout the proceeding.

The Taxpayer generally objects to this Court's

conclusion that the records of Fiore Trucking and Contracting were inadequate [*727] and not in compliance with statutory and regulatory record-keeping requirements. Section 271(a) of the Code provides that a taxpayer shall keep records, render statements, and make returns that comply with Revenue's rules and regulations. 72 P.S. @ 7271(a). Under the regulations, a taxpayer who sells or uses personal property or services must 1) retain all purchase invoices and other documents relating to acquisition of taxable property and services, and 2) if the tax has not been paid the tax, the taxpayer must create or maintain records showing records documenting the nature, use, price, dates of the purchase, etc. from which it can be ascertained "with reasonable facility" whether use tax is due and [**11] the amount of the tax. 61 Pa. Code @ 34.2(a)(1).

In our view, nothing is so patently obvious as the

Taxpayer's failure to maintain adequate records. The Taxpayer failed to produce such records when requested during the audits and again during the evidentiary hearings. Boxes of unsorted invoices, bills of lading, weight slips, drivers' logs, and other documents do not permit the taxing authority to ascertain with reasonable facility whether tax is due and how much tax is due. The Taxpayer has suffered the consequences of his inadequate record keeping in that he is unable to document use of the assessed equipment in providing public utility services.

Accordingly, petitioner's exceptions are overruled, and the Court's order of December 15, 1995 is affirmed. Judgment shall be entered in favor of the Commonwealth as set forth in that order.

JAMES GARDNER COLINS, President Judge

Judge Pellegrini did not participate in the decision in this case.

ORDER

AND NOW, this 22nd day of April, 1996, petitioner's exceptions 1 through 12 are overruled, and the Court's order of December 15, 1995 in the above-captioned matters is affirmed. The Chief Clerk is directed to enter [**12] judgment in favor of the Commonwealth of Pennsylvania in the following amounts:

925 C.D. 1980

Use Tax--$ 216,741.26 plus appropriate interest

895 C.D. 1985

Use Tax--$ 770,495.79 plus appropriate interest and penalties

1029 C.D. 1985

Fuel Use Tax--$ 81,728.57 plus appropriate interest and penalties.

JAMES GARDNER COLINS, President Judge

WILLIAM M. FIORE, t/d/b/a

FIORE TRUCKING AND CONTRACTING

COMPANY,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, BOARD

OF FINANCE AND REVENUE,

Appellee.

No. 83 M.D. Appeal Docket 1996,

No. 84 M.D. Appeal Docket 1996,

No. 85 M.D. Appeal Docket 1996

SUPREME COURT OF PENNSYLVANIA

690 A.2d 234; 1997 Pa. LEXIS 568

March 25, 1997, DECIDED

SUBSEQUENT HISTORY: [*1] Application for

Reargument Denied May 9, 1997,

Reported at: 1997 Pa. LEXIS 1035.

PRIOR HISTORY: Direct appeal from the order of the Commonwealth Court dated April 22, 1996, at 925 C.D. 1980, 895 C.D. 1985 and 1029 C.D. 1985, affirming the Commonwealth Court's order of Dec. 15, 1995.

JUDGES: Madame Justice Newman did not participate in the consideration or decision of this case.

OPINION:

ORDER

PER CURIAM:

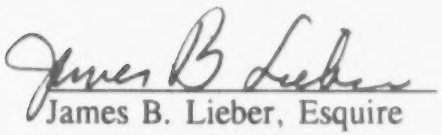
DECIDED: MARCH 25, 1997

AND NOW, this 25th day of March, 1997, the opinion of the Commonwealth Court is affirmed.

Madame Justice Newman did not participate in the consideration or decision of this case.

Respectfully submitted,

LIEBER & HAMMER, P.C.



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